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THE IRON & WOODEN STEAM
NAVIGATION COMPANY, owners of
the Propeller "Hesperus".

THE BRITISH AMERICAN MARINE
INSURANCE COMPANY,
Limited.

THE UNION MARINE INSURANCE
COMPANY.

THE INSURANCE COMPANY OF
NORTH AMERICA, and the
MARINE INSURANCE COMPANY,
Limited, Intervening Underwriters.

THE UNION STEAMSHIP COM-
PANY, owner of the Propeller "New
York".

Respondent.

634

Application for Writ of Certiorari to the United States Circuit
Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONERS.

HARVEY D. GOULDNER,

JOHN C. SHAW,

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Transportation Company.

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Counsel for Intervening Under-
writers.

DETROIT:

The Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.

1901.

The Supreme Court of the United States.

THE ERIE & WESTERN TRANSPORTATION COMPANY, owner of the Propeller Conemaugh,

THE BRITISH AND FOREIGN MARINE INSURANCE COMPANY, Limited,

THE UNION MARINE INSURANCE COMPANY, Limited,

THE INSURANCE COMPANY OF NORTH AMERICA and the MARINE INSURANCE COMPANY,

Underwriters on Cargo,
Petitioners.

vs.

THE UNION STEAMBOAT COMPANY, owner of the Propeller New York,

Respondent.

On Petition for Writ of Certiorari.

BRIEF IN SUPPORT OF PETITION.

The questions involved in this case are of general importance. They interest not only the parties involved in this litigation, but also all who are engaged in the vast commerce of the lakes, and therefore justify us in asking this Court to issue its writ of certiorari that the questions may be settled by its supreme authority.

These questions may be thus stated:

1. Do the laws of the United States and the rules of navigation prescribed by the Supervising Inspec-

tors have any extra-territorial effect; and do they apply in cases of collision between American vessels when navigating the waters of the Dominion of Canada, and beyond the territorial limits of the United States?

2. Will a Court of Admiralty in this country, in cases of collision occurring in Canadian waters, take judicial notice of the Canadian law prescribing regulations for prevention of collisions, or must such law be shown by technical proof?
3. Do the international rules and regulations prescribed by the Act of March 3, 1885, 23 Stat., 438, which were in force at the time this collision occurred, apply to the Great Lakes and connecting waters, or are those lakes and waters to be considered lakes and inland waters of the United States, and so excepted from the operation of said Act of 1885, and therefore subject to the rules prescribed by Sec. 4233, R. S., and the rules of the Supervising Inspectors?
4. If Inspectors' Rule 2 is valid and applicable to steamers meeting on crossing courses in the manner in which the Court of Appeals finds that the Conemaugh and the New York were approaching each other, does it require the obligated vessel in every case to port and pass astern of the other, or may she keep out of the way by passing ahead or astern of the other, at her option?
5. If the laws of the United States and rules of the Supervising Inspectors apply to American vessels while navigating the waters of Canada, and beyond the territorial limits of the United States, is it the duty of the privileged vessel to answer the signals of the other, or may she disregard such signals, although the two vessels are approaching

each other so as to involve risk of collision, and such signals, which are repeated several times, indicate the intention of the other vessel to cross the bows of the privileged vessel?

6. If two steamers are approaching on crossing courses so as to involve risk of collision, and the one whose duty it is to keep out of the way indicates by her signal lights and by her whistle her intention to cross the bows of the privileged vessel, is such privileged vessel justified in changing her course so as to thwart the movements of the other, because of the intervention of a third vessel, moving across the course of the privileged vessel, and which the privileged vessel might avoid by temporarily checking or stopping?
7. If two steamers are approaching each other in the nighttime on crossing courses so as to involve risk of collision, is the privileged vessel justified in holding her course with unabated speed, without a lookout, after the steamer whose duty it is to keep out of the way has indicated her intention to pass ahead by signals of two blasts of the whistle, which are repeated several times, and which would have been heard by the privileged vessel if a proper lookout had been maintained?
8. If two steamers are approaching each other on crossing courses so as to involve risk of collision, and the one which has the other on her starboard bow indicates by her signal lights and by her whistle, that she intends to cross the bow of the privileged vessel, is such privileged vessel justified in changing her course so as to thwart the movements of the steamer whose duty it is to keep out of the way, because of the intervention of another vessel moving across the course of the privileged

vessel, or is it the duty of such privileged vessel, under the circumstances, to check or stop until such intervening vessel has moved out of the way?

I.

As to what law is to be applied in cases of collision between American vessels when navigating in Canadian waters outside of the territorial limits of the United States.

The law of Canada in cases of collision differs from the law of the United States in some important particulars. There is no Canadian law or regulation which corresponds to our Supervising Inspectors' Rule 2, which, as construed by the Circuit Court of Appeals, requires that when steamers are approaching each other on crossing courses, the one that has the other on her starboard side shall port and go astern of the other.

All American vessels navigating between the upper and lower lakes are compelled at times to pass through Canadian waters. There is a large number of Canadian vessels engaged upon the lakes and their number is constantly increasing.

Does an American vessel carry the laws of the United States with her when she passes out of the territorial jurisdiction of the country? Is she still bound by the Supervising Inspectors' Rules when she is not navigating the waters of the United States?

Must she conform to these regulations when she is meeting an American vessel in Canadian waters, and not conform to them when she is meeting a Canadian vessel? How is she to know, especially in the nighttime, whether the approaching vessel is American or Canadian? Such vessels have the same general appearance. They are built

alike; they carry the same lights. How is the navigator to know what regulations he must conform to, unless the question is to be determined by the waters in which he is navigating?

Is not this a matter of sufficient general importance to demand the attention of this Court and to justify it in issuing the writ of certiorari in this case?

The general rule is that the municipal regulations of one country have no extra territorial effect; and that the wrongfulness of the conduct complained of as a cause of action in tort, is determined by the *lex loci* and not by the *lex fori*.

1 Jaggard on Torts, 102.

Northern Pacific R. R. Co. vs. Baedock, 154 U. S., 190.

This principle has been recognized in collision cases.

Smith vs. Condry, 1 How., 28.

The China, 7 Wall., 53.

The M. Moxham, 1 P. D., 107.

Marsden on Collisions, Secs. 208-216.

Carver on Carriage by Sea, p. 730, after quoting from the British statute that in cases arising in any British court concerning matters happening within British jurisdiction, foreign ships, so far as regards regulations for preventing collisions, shall be treated as if they were British ships, adds: "*Where the collision has taken place within a foreign jurisdiction the rule is different.*"

In the *M. Moxham*, above cited, James, L. J., said:

"If I take my coachman to France, and he, in driving, injures a carriage in France, I do not take with me the law of *respondet superior* so as to make me liable. * * * Again: If by the law of the foreign country, a particular person is justified or is excused * * * he will not be answerable here."

By the general maritime law, by the law of England and by the law of Canada, a ship whose duty it is to keep out of the way of another may go ahead or astern of the other, and according to this law, the Conemaugh was justified and had the right to cross the bows of the New York.

Marsden on Collisions, 411.

The Nor. 2 Asp., 264.

But the Circuit Court of Appeals held that the Conemaugh, under Inspectors' Rule 2, was bound to port and pass astern of the New York, although the vessels were not then navigating the waters of the United States, but waters of Canada, and notwithstanding by Sec. 4400 of the Revised Statutes the operation of the Inspectors' Rules is limited to vessels navigating waters of the United States.

Spencer on Collisions, Sec. 20.

If Inspectors' Rule 2 is not to be held to be in derogation of Sailing Rule 19, prescribed by Congress, and therefore void, can it, in view of Sec. 4400, be given extra-territorial effect?

The Circuit Court of Appeals held that there was not sufficient technical proof of the Canadian statute as a foreign law, but it is clear from the opinion that the statute was in fact before the Court, and our contention is that a court of *admiralty* will take judicial notice of foreign regulations for the prevention of collisions without such technical proof as might be required by a common law court in an ordinary action.

Talbot vs. Seeman. 1 Cranch, 1.

The Scotia, 14 Wall., 170-186.

Marsden on Collisions, 310-340.

Wharton on Conflict of Laws, Sec. 771.

Wharton on Evidence, Secs. 285, 331.

But if the rule is otherwise, then, in the absence of technical proof, the general maritime law will be presumed to exist in Canada, and under that law the *Cone-maugh* was not obliged to port and go astern of the *New York*, but might cross her bows at a proper distance ahead.

The Canadian statute which was before the Circuit Court of Appeals is printed in *Howell's Admiralty Practice* (Canada), p. 239, where the author states in a footnote:

"The imperial regulations upon which these are founded, and which came into force 1st September, 1884 (Order in Council, 9 P. D., 248), apply to British, and by international assent, to French, Italian, Greek, Portuguese, Norwegian, Swedish, Brazilian, Turkish, Chilean and Danish ships and boats (Marsden's Law of Collisions at Sea, 3d. Ed., 358). The United States have adopted regulations very nearly corresponding."

In the report of the Commissioner of Navigation for 1885, at p. 136, the Commissioner says:

"This code, which is now accepted as an integral part of the law of the sea, embodying the 'rule of the road,' in so far as navigation outside of the territorial waters of this country is concerned, was formally adopted by the United States Congress March 3, 1885. The attention of all persons concerned was immediately directed to the changes in the steering and sailing rules made by the act referred to, by a circular issued from this office under date of March 25 following (Treasury Department No. 40), which contained the new act printed side by side with the old law. The text of the Revised Regulations, which, although observed by all vessels on the ocean, is now given the sanction of law in the navigation of public and private vessels of the United States upon the high seas, and in all coast waters of the United States except harbors, lakes and inland waters, is subjoined."

In Gould & Tuckers' Notes, Ch. 5 (Navigation), p. 785, speaking of the rules fixed by Sec. 4233, R. S., it is said:

"These rules were adopted by more than thirty
"of the principal states of the world, and were at
"once regarded as entitled to judicial notice. The
"Scotia, 14 Wall., 170; 3 Blatch., 308; The Sylves-
"ter Hale, 6 Ben., 523. The Revised Code was
"adopted by Great Britain in 1884, and this and the
"regulations of 1863 are set out in parallel columns
"in Marsden's Law of Collision (2d. ed.), 471-485.
"This Revised Code has been adopted by the lead-
"ing nations, and is the act of March 3, 1885, ch.
"354 (23 St., 438)."

II.

Do the International Rules prescribed by the Act of 1885 apply to the lakes and their connecting waters?

By that act Congress provides:

"That the following revised international rules and regulations for preventing collision at sea shall be followed in the navigation of all public and private vessels of the United States upon the high seas and all coast waters of the United States, except as are otherwise provided for, namely:—"

Then follow twenty-seven rules for navigation.

Section 2 provides:

"That all laws and parts of laws inconsistent with the foregoing revised international rules and regulations for the navigation of all public and private vessels of the United States upon the high seas, and in all coast waters of the United States are hereby repealed, except as to the navigation of such vessels within the harbors, *lakes and inland waters* of the United States."

The Court of Appeals holds that the Great Lakes are to be regarded as "lakes and inland waters," and so within the exception to the repealing clause of the Act of 1885, and therefore that Section 4233, Revised Statutes, furnishes the navigation rules applicable to this case. .

The North Star, 62 Fed., 73.

The question is whether the Great Lakes are to be considered as "*lakes and inland waters*," or are they *coast waters*, or high seas within the meaning of the Act of 1885.

The construction given by the Court of Appeals to the words "lakes and inland waters" is inconsistent with the construction placed by this Court in *Moore vs. Transportation Co.*, 24 How., 1, upon almost the identical words in the "limited liability act," Revised Statutes, 4289. It is also inconsistent with the decisions of other courts construing these words.

American Transportation Co. vs. Moore, 5 Mich., 368.

The Garden City, 26 Fed., 793.

In each of these cases it was held that the words "lakes and inland waters" do not include the Great Lakes.

In the Seventh Circuit, which includes among other important ports Chicago and Milwaukee, it was held by the District Court, in direct conflict with the decision in the *North Star* in the Sixth Circuit, that the law of 1885 did apply to the lakes.

The Robert Holland and Parana, 59 Fed., 200.

The decision on this point seems to have been so well received that, though the case was appealed, it was affirmed without discussion as to this point. See the same case reported as

Bigelow vs. Nickerson, 70 Fed., 113.

In the case already cited, *Moore vs. American Transp. Co.*, 24 How., 1-37, the magnitude of lake commerce at that time (1851) is described. In a report presented to the House of Representatives by the Secretary of the Treasury (55th Cong., 2d Session, Document No. 277) it is shown that the tonnage of the lakes has trebled; that is to say, it has increased from 450,000 in 1868 to 1,350,000 in 1897. In transmitting the document, the secretary says:

"Compared with the shipping tonnage employed in the foreign commerce of the United States, the activity of the lake shipping is far greater. The bulk of transactions in the lake-carrying interests is so large as to rank it among the great conveyers of the world."

This Court has already referred to the Great Lakes in this language:

"These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other."

The Genesee Chief, 12 How., 443-453.

In *Ill. C. R. R. vs. Illinois*, 146 U. S., 387-435, the Court said:

"These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas."

And again (437):

"That the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over the ownership of lands under tide waters on the borders of the sea, and that lands are held by the same right in the one

"case as in the other, and subject to the same trusts
"and limitations."

Speaking as to the term "high seas," as used in Sec. 5346, R. S., the Court said, 150 U. S., 261:

"The more reasonable inference is that Congress
"intended to include the open, uninclosed waters
"of the lakes under the designation of high seas.
"The term, in the eye of reason, is applicable to
"the open, unenclosed portion of all large bodies of
"navigable waters, whose extent cannot be meas-
"ured by one's vision, and the navigation of which
"is free to all nations and people on their borders,
"by whatever names those bodies may be locally
"designated. In some countries small lakes are
"called seas, as in the case of the Sea of Galilee in
"Palestine. In other countries large bodies of
"water, greater than many bodies denominated
"seas, are called lakes, gulfs, or basins. *The nomen-
"clature, however, does not change the real char-
"acter of either*, nor should it affect our construc-
"tion of terms properly applicable to the waters of
"either. By giving to the term 'high seas' the con-
"struction indicated, there is consistency and sense
"in the whole statute, but there is neither if it be
"disregarded. If the term applies to the open, un-
"enclosed waters of the lakes, the application of the
"legislation to the case under indictment cannot
"be questioned, for the Detroit River is a water
"connecting such high seas, and all that portion
"which is north of the boundary line between the
"United States and Canada is without the juris-
"diction of any State of the Union."

Then on page 263:

"There are vessels of every description on those
"inland seas now carrying on a commerce greater
"than the commerce on any other inland seas of the
"world."

And on page 266:

"It is true that lakes, properly so called, that is,
"bodies of water whose dimensions are capable of

"measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or States or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. *And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.*"

These are waters reached from the ocean; and by treaty the artificial canals used to avoid natural obstructions are open to the use of our own people and the people of Canada.

III.

Has the Circuit Court of Appeals in this case properly construed Inspectors' Rule No. 2?

As already stated, that Court held that under this rule, it was the duty of the Conemaugh to port and go under the stern of the New York.

The rule is as follows:

"When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation) they shall pass to the right of each other as if meeting 'head and head,' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified."

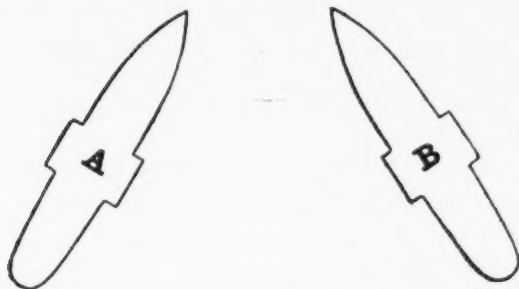
The following is a diagram of the fourth situation referred to, and which is furnished by the inspectors to illustrate the rule.

The Court of Appeals holds that this rule applies to all steamers meeting on crossing courses so as to involve the risk of collision, but the rule itself refers to steamers ap-

proaching each other in an *oblique* direction as shown in the diagram.

"FOURTH SITUATION.

"This is a situation requiring great caution; the red light of B in view to A, and the green light of A in view to B, will inform both that they are approaching each other in an oblique direction. A should put his helm to port, and pass astern of B, while B should continue on his course or port his helm, if necessary to avoid collision, each having previously given one blast of the steam-whistle, as required by the rules when passing to the right."



The New York and Conemaugh were not approaching each other as indicated in the diagram; they were on crossing courses, the Conemaugh coming *down* the river and the New York going *up* the river.

Rule 19, prescribed by Congress, Revised Statutes, Sec. 4233, declares:

"If two vessels are crossing each other so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

Rule 23 declares that:

"Where one of two vessels shall keep out of the way the other shall keep her course, subject to the qualifications of Rule 24."

The New York and Conemaugh were on crossing courses so as to involve risk of collision, and if Inspectors' Rule No. 2 was intended to apply to such a case, does it not conflict with Rule 19, in that it provides that "B" (the New York) may port her helm? Is the duty to port under such circumstances consistent with the duty of the New York to keep her course as enjoined by the Act of Congress.

IV.

As to the duty of the New York to answer the Conemaugh's signals.

The Circuit Court of Appeals held that she was not obliged to answer, although Inspectors' Rules 1 and 2 expressly make it the duty of a steamer meeting another to indicate the course she intends to take by a proper signal, and they also require the other steamer to answer such signal promptly. These rules are set out in full in our petition, and need not be quoted here.

If these rules are applicable they have the force of law.

They contain no exception. Can the Court excuse a steamer for not answering because she has the right of way and thus make an exception not provided for in the rules? The importance of the rules requiring signals to be answered has been recognized by the Treasury Department, as will appear by the following circular:

CIRCULAR.

CAUTIONARY NOTICES TO PILOTS OF STEAM-VESSELS REGARDING THE USE OF SIGNAL-WHISTLES.
TREASURY DEPARTMENT.

1890.

Department No. 10.

Office of the Supervising Inspector-General of Steam Vessels,

Washington, D. C., February 25, 1890.

The attention of pilots of steam vessels is called to the frequent collisions occurring through failure to observe the pilot rules laid down by the Board of Supervising Inspectors, whereas if such rules were strictly observed collisions would be almost absolutely impossible.

The main causes of collisions result from the failure of pilots to consider Rules I. to VII., inclusive, in strict connection with Rule III., of the Pilot Rules for Lakes and Seaboard, which rule reads as follows:

"Rule III. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other cause, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam-whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage-way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The rule quoted qualifies all the others, and is the only qualification that can be permitted with safety when steamers are meeting in such positions as to render collisions possible. There is no authority in the rules and regulations for vessels approaching each other from opposite directions, for what has become technically known among pilots as "cross signals"—that is, answering one whistle with two, and answering two whistles with one. In all cases, and under all circumstances, when a pilot receiving either of the whistle signals provided in the rules, which for any reason he deems injudicious to com-

ply with, instead of answering it with a cross-signal, as is now so much the custom to do, it is his imperative duty to at once observe the provisions of Rule III., namely, give the alarm-signal whistle and at once slow his engine and reduce speed to bare steerage-way; and the opposing vessel, immediately on hearing the alarm-signal whistle, should also slow down, and stop if necessary, till the danger of collision is passed.

In investigating collision cases, inspectors of steam vessels would be justified in considering any pilot who gives a cross signal instead of complying with Rule III. *prima facie* guilty of neglect of duty. So, also, of the pilot giving the first signal, who fails to slow or stop his boat immediately after he discovers his signal whistles are answered otherwise than as given by himself.

Rule II. of the Pilot Rules for Western Rivers has the same application to those rules that Rule III. of the Pilot Rules for Lakes and Seaboard has to the latter rules, and it must be observed in the same manner. It is desirable that all pilots should thoroughly understand that when whistles are blown as passing signals, it is a rule, never to be deviated from, that one whistle means that the vessel giving such signal is or intends porting her helm; two whistles, that the vessel giving it is or intends putting her helm to starboard.

Local inspectors of steam vessels will make requisition on the department for a sufficient number of this circular to supply each pilot of steam vessels in their respective districts.

JAS. A. DUMONT,
Supervising Inspector-General.

Approved:

WILLIAM WINDOM,
Secretary.

In view of the express language of the rules and of the action of the Treasury Department, can the Court properly excuse a steamer from fault in not answering signals simply because she has the right of way?

If the Canadian rules or our own under the law of 1885 apply, then the circumstance that the New York did not

answer our signals is immaterial. Either law makes the use of signals optional with each steamer, and the holding of the Circuit Court of Appeals that the silence of the New York denoted dissent on her part, is clearly erroneous.

The argument is that the use of signals being optional, under the Canadian law, and the law of 1885, while it was entirely proper and to be expected that the Conemaugh, charged with an active duty, would indicate to the New York the manner in which she proposed to discharge that duty, yet the use of signals being optional, an assenting signal from the New York, which would impose no fresh obligation upon either, would mean neither more nor less than her silence; assuming that she heard our signals which the master of the Conemaugh had the undoubted right to assume were heard.

On the other hand, the law, under R. S., Sec. 4233, provides for no signals whatever, and no fault could arise and no presumption be based upon the use or non-use of signals under that law. If, therefore, anything is to be argued from the use or non-use of signals, it must be under the rules of the Supervising Inspectors, and while one of those rules requires that we should signal our intention, another rule (No. 3) as positively requires the New York to answer with an assenting signal, or, if she was in doubt as to our course, or disapproved of it as dangerous, at once to give a succession of short blasts as a danger signal, and *immediately to reduce her speed to bare steerage-way* and reverse if necessary.

There is difficulty in understanding how the Conemaugh can be held under the Inspectors' rules, and so glaring an infraction of the same rules on the part of the New York overlooked, when that steamer simply explains that she broke the rules because, failing to keep any watch, she

was ignorant of the Conemaugh's presence and of her signals.

V.

As to the duty of the New York to maintain a sufficient lookout.

This has already been referred to in our brief; the importance of the question must be evident. Is the vessel to be excused from obtaining a lookout because she has the right of way?

VI.

As to the right of a steamer bound to hold her course, to deviate therefrom because of the intervention of another moving vessel.

The Circuit Court of Appeals excused the New York for changing her course because of the intervention or presence of the barges which were moving across her course towards the American shore. These barges were not fixed obstructions like a rock, or bank or shoal. They were vessels under way, moving on a course or in a direction known to the New York. They were in tow of the Burlington, and their speed independent of the current was at least two or three miles an hour. They would have moved out of the way and left the New York a clear and unobstructed passage on her course if the latter had but checked her speed for a few moments. Was it not her duty to do so, especially in view of the presence of the Conemaugh, and the signals which she had sounded. Had

the New York the right to navigate in disregard of the presence of the Conemaugh? Did the Court of Appeals err in holding that "her proper course could not be affected by the fact of the Conemaugh's presence?"

We respectfully submit that these questions are of such vital importance as to justify us in this application for a writ of certiorari.

VII.

As to the duty of the New York in this case to check her speed or stop.

The law on this question, as laid down by this Court in *The Delaware*, 161 U. S., 459, seems to be that it will not be a fault for the preferred vessel to maintain her course and speed "in the absence of some distinct indication that the other is about to fail in her duty."

And the important point arises as to what shall be held to be such an indication; and whether in this case such an indication existed as ought to have shown to the master of the New York the necessity of checking or stopping in order to avoid the danger of collision.

Now the conceded facts are:

1. That the steamers were approaching on crossing courses so as to involve risk of collision.
2. That they were each showing to the other a single colored light; that is to say, the Conemaugh was showing to the New York a green light, and the New York was showing to the Conemaugh her red light. The New York at no time saw nor could see the Conemaugh's red light.

3. The Conemaugh indicated by her signals of two blasts of her whistle, which were repeated three times, and which the men on the New York ought to have heard, and which they would have heard if they had maintained a proper lookout, that the Conemaugh intended to cross the bows of the New York.

Was not the exhibition of the Conemaugh's green light and its continued bearing on the New York's port bow, together with her signals of two blasts which were repeated three times, with nothing to prevent them from being heard, a sufficient indication that the Conemaugh was not going to keep out of the way except by crossing ahead of the New York?

This is a question of importance to the navigators of the lakes, to which the authoritative answer of this Court is requested. May a steamer which has the right of way under Rule 19 keep her course with unabated speed when she sees only the green light of the other full upon her port bow, and heard from the other signals of two blasts of the whistle, declaring that the other intends to cross the bows of the privileged steamer? May she maintain her speed when the other steamer, in the language of the Circuit Court of Appeals in this case, "is either in or dangerously near the course of the" privileged vessel, and is "not keeping out of her way?"

There is a conflict between the opinion of the Court of Appeals for the Sixth Circuit, in this case, and that of the Court of Appeals for the Second Circuit, in *The George S. Shultz*, 84 Fed., 508, affirming the decision of Judge Brown in 74 Fed., 574.

The Court of Appeals in this case, speaking of the duty of the New York to resume her course after passing the

Burlington's tow, to which reference will be made later in this brief, says:

"It is clear that the course of the New York "would not naturally be confined to swinging on "her starboard wheel through the passage not much "wider than her length. That would not have been "the easy sweep which she was entitled to make in "turning back towards mid-channel. The Cone- "maugh, therefore, being where she was, was either "in, or dangerously near the course of the New "York, and was not keeping out of her way. More "than this, she increased her fault by throwing "herself right across the bows of the New York." (82 Fed., 825.)

The question, therefore, presents itself, whether the privileged steamer, under Rule 19, is to be held free from fault if she continues on without checking or stopping when the other steamer "is either in or dangerously near" her "course and [is] not keeping out of the way."

Whatever may have been the fault of the obligated steamer in placing herself in or dangerously near the course of the preferred steamer, and in not keeping out of the way, does the law permit the preferred steamer to maintain her speed unabated, and rush into collision without stopping or checking, and without sounding a signal of warning? This question is sharply presented in this case. It involves the safety of property and the lives of passengers, the transportation of which go to make up the vast commerce of the lakes. We submit that it is of sufficient importance for this Court to consider, and therefore justifies the application for the writ of certiorari in this case.

The Circuit Court of Appeals justified the New York for not stopping or checking under the decisions of this Court in

The *Britannia*, 153 U. S., 130, and the *Delaware*,
161 U. S., 450.

And it is a matter of general importance to all who are interested in navigation upon the Great Lakes as seamen or owners, to know from this Court—the supreme authority—whether the rule laid down in those cases was intended to justify a steamer navigating so great a thoroughfare of commerce as the Detroit River, thronged with vessels of all kinds by day and by night, if she has no lookout, if the persons navigating her pay so little attention to an approaching steamer, in a clear night, that they neither see her lights nor hear her signals, although such lights are properly placed and burning brightly, and although such signals are of such a character as to answer the requirements of the law in every respect.

We believe, and therefore submit, that the cases cited do not justify such a conclusion. The distinction between the controlling facts in each of those cases, and those involved in the one at bar, seems to be so clear as to destroy all analogy between them and this case. As the Court is entirely familiar with those cases, it is unnecessary for us to dwell upon them, except to remark that in neither of them did the obligated steamer indicate by her lights and signals that she intended to cross the bows of the preferred vessel. In neither of those cases did it appear, as the Circuit Court of Appeals finds in this case was true of the *Conemaugh*, that the obligated vessel was either in or dangerously near the course of the preferred vessel, and was not keeping out of the way, and in neither of those cases was there an absence of a lookout.

It is true that the Court of Appeals, in excusing the *New York* for want of a lookout, and for her failure to see the *Conemaugh*, says in its opinion that "if she had seen her she would have seen her swinging slowly to the port of the *New York* in the wake of the barges in the tow," etc. But waiving the manifest inconsistency of this

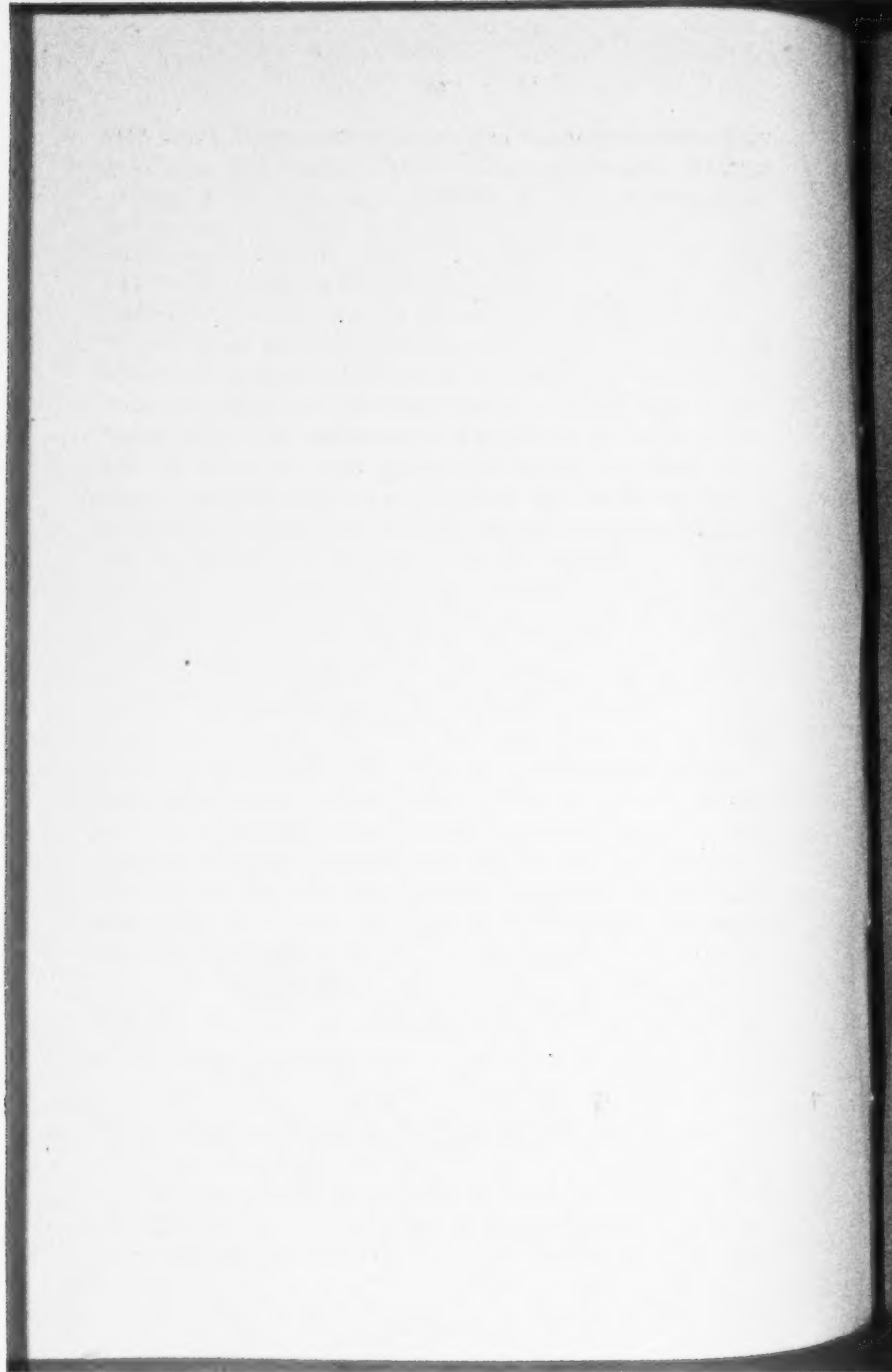
with other findings, a lookout or proper watch must also have been seen, according to the Court's express findings, "that the steamers were on crossing courses so as to involve risk of collision, and that the New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, each showing to the other but one light." We have also the finding by the Court that it was the duty of the New York, after passing the stern vessel in the tow, "to resume her general course up stream near mid-channel," which she could only do by starboarding. And if the Conemaugh was bearing to the port of the New York in any such sense as that she might clear, starboarding by the latter would manifestly produce danger of collision. This suggestion of what a lookout might have seen is not of a character and surely was not intended to modify the finding that the vessels were on crossing courses so as to involve risk of collision, which the Court of Appeals distinctly finds to have been the fact, and which is, indeed, the sole basis of the case as against the Conemaugh.

As will be seen, the questions involved in this case are, to a degree at least, independent of each other. But they are all of general importance to the commerce of the lakes; and in view of this fact, and of the apparent conflict of opinion which exists between the Circuit Court of Appeals for the Sixth Circuit, by which this case was decided, on the one hand, and the decisions in the Seventh Circuit, and also in the Second Circuit, on the other, we respectfully submit that the writ should issue in this cause.

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1st Ex. 56.

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MAR 30 1899
JAMES H. MCKENNEY,
Clerk.

Brief of Goulder for Petitioners.

No. 277.

Filed Mar. 30, 1899.
Supreme Court of the United States.

THE ERIE & WESTERN TRANSPORTATION COMPANY, et al.,
PETITIONERS,

vs.

THE UNION STEAMBOAT COMPANY, CLAIMANT OF THE
PROPELLER "NEW YORK."

BRIEF FOR PETITIONERS.

HARVEY D. GOULDER,
JOHN C. SHAW,

Proctors for Petitioner, The Erie
& Western Transportation Co.

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Supreme Court of the United States.

OCTOBER TERM, 1898.

THE ERIE & WESTERN TRANSPORTA-
TION COMPANY, et al.,

Petitioners,

vs.

THE PROPELLER "NEW YORK," THE
UNION STEAMBOAT COMPANY,

Claimant.

No. 277.

DISTRICT JUDGE'S OPINION, 53 FED., 553; ON REHEARING,
REC. 196.

CIRCUIT COURT OF APPEALS, 82 FED., 821, REC. 275.

STATEMENT.

About 8 o'clock p. m., Oct. 21, 1891, petitioner's steamer, the Conemaugh, down bound, laden with about 1,800 tons of package freight, being a steamer 250 feet long, 35 feet beam, came into collision with the propeller New York, up-bound, laden with a cargo of general merchandise, being a steamer 270 feet in length, 37 feet beam. The collision occurred on the Canadian side of the Detroit river a short distance below the town of Sandwich. The Conemaugh was struck on her starboard side forward, and almost immediately thereafter beached on the Canadian channel bank. The damage to the Conemaugh and cargo, as fixed

by the decree in the District Court, was \$69,978.91; the New York's damage, as stated in the cross-libel, was about \$3,000.

The circumstances of collision were as follows:

The Conemaugh, with all the signal lights required by law, properly placed and burning brightly, and a full complement of officers and crew properly stationed and attentive to their duties, including two men at the wheel, was proceeding down on a course somewhat to the American side of mid-channel. At a point about three-quarters of a mile above Smith's coal dock, on the American side, her watch discovered the propeller Burlington, with a tow of four lumber barges, which from a course down the river on the Canadian side of mid-channel was rounding to for the purpose of coming up to Smith's dock. The length of the tow was about 2826 feet; the channel at that point was 3000 to 3300 feet wide. When around so as to exhibit to the Conemaugh her own green and white lights and the green light of her first barge, the Burlington blew a signal of two blasts, indicating to the Conemaugh that she should pass down between the tow and the Canadian shore. The Conemaugh answered with two blasts, checked her engine from 70 to 40 revolutions, and hard starboarded in accordance with the signals exchanged. The master of the Conemaugh, with the aid of his glass, seeing sufficient room to pass between the tow and the Canadian shore, adopted a diagonal course down and across the river, and while on that course the lights of the propeller New York were seen coming up the river a considerable distance below the tow; thereupon the Conemaugh blew to her a signal of two blasts, indicating

her purpose to continue her course and pass down on the Canadian side. The Conemaugh was then in Canadian waters, and the New York, apparently, about mid-channel. Receiving no answer, the Conemaugh repeated her signal, but without reply. The vessels were then perhaps three-quarters of a mile apart. The clear space of navigable water between the tow and the Canadian shore was 800 to 1000 feet, as found by the District Judge; not less than 500 feet, as found by the Circuit Court of Appeals, which adopted the lowest estimate; but in either view, sufficient for the navigation of the two steamers.

In this situation the Conemaugh again blew a signal of two blasts. Dispute exists as to her distance astern of the tow, the shortest distance suggested by the testimony being 300 feet; clear evidence, in our opinion, fixing it at from 700 to 1000 feet. Both vessels were now in Canadian waters, and the Conemaugh was crossing the course of the New York at a safe distance ahead. To this third signal of two blasts there was no answer.

Shortly after this third two blast signal and doubtless for the purpose of avoiding the rear barges of the tow but without signal of any character to the Conemaugh, the New York sharply altered her course by porting; the Conemaugh blew an alarm signal, and, as the only chance of possible escape, put her helm hard a-starboard and gave a strong signal to the engine. The New York, which was then abreast of a point between the last two barges of the tow and not over a quarter of a mile from the Conemaugh, stood on with undiminished speed and having started to swing back on starboard helm, she failed to clear by that manœuvre, and not

abating her speed she struck the Conemaugh near the forward gangway and the latter sank within a length (250 ft.) of the Canadian bank.

The evening was clear and starlight; there was nothing to prevent the New York from seeing the Conemaugh's lights or hearing her signals if a proper watch were kept.

The New York did not at any time signal the Conemaugh, nor did she stop or check her speed before the collision. On behalf of the New York, no witnesses were called although her officers and crew were in court, but her answer asserted an entire failure to see the lights of the Conemaugh and to regard or hear her signals. The language of the answer is :

"When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel;" (9)

also, that while passing under the stern of the last barge, having starboarded her helm, she heard several short blasts from the Conemaugh close at hand, not more than 100 feet away, but

"collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard a-starboard helm." (10.)

Before she rounded to and signaled the Conemaugh, the Burlington had exchanged signals of one blast with the New York, then a mile and a half or more below the Burlington, coming up somewhat on the American side of mid-

channel. The New York and the Conemaugh were then more than three miles apart and these signals were not heard nor the presence of the New York discovered by the Conemaugh, although a proper watch was kept, until after the Conemaugh had starboarded and was in the performance of her agreement with the Burlington, as before stated.

HISTORY OF THE CASE.

Nov. 11, 1891, libel was filed in the District Court for the Eastern District of Michigan by the Erie & Western Transportation Company, as owner of the Conemaugh and as trustee for persons interested in the cargo, and subsequently the insurance companies intervened for their interest as underwriters on cargo.

The libel alleges,

Third. * * * Between 7 and 8 o'clock p. m., of said day (Oct. 21, 1891), the weather then being clear and fine, the Conemaugh was proceeding down the Detroit river to the American side of mid-channel, having hauled some to starboard to avoid some piles driven in the channel, and when a half or three-quarters of a mile above the said coal dock (Smith's dock), she received a signal of two blasts from a steamer which, with four barges in tow, had, theretofore being going down the Canadian side of the river and was then rounding in and up to and was near the said coal dock, exhibiting her masthead and green lights to the Conemaugh.

The Conemaugh's engine was at once checked and remained checked until after the time of collision hereinafter stated, her helm starboarded, and she answered with two blasts, and hauled out sharply, keeping some distance above the tow and so directing her course as to pass astern and to the Canadian side of the said tow, which was "rounding to" and which then stretched out in the river towards the Canadian side.

The Conemaugh then made the lights of a steamer, which proved to be the said propeller New York, then down the river below the said tow and coming up so heading towards the Conemaugh, and on such a course that the Conemaugh, as she was proceeding, would cross the New York's course before the New York could reach the point of intersection of the two courses.

The Conemaugh at once blew to her a signal of two loud and distinct blasts of her whistle, thus notifying the New York that the Conemaugh was so directing her course as to go well in on the Canadian shore and to leave the tow and the New York to starboard as she should come abreast of them respectively.

Not receiving a reply thereto, the Conemaugh promptly repeated the signal of two blasts. To this second signal the New York did not reply, and again the Conemaugh blew a two-blast signal; when the New York which had all the time been coming rapidly up the river, still without replying to any of the Conemaugh's signals, turned suddenly and rapidly to starboard, swinging over toward the Canadian shore; whereupon the Conemaugh blew alarm whistles and hard starboarded her helm.

Notwithstanding there was ample room, had the New York properly approached, and had she been properly handled, for the Conemaugh and the New York to have safely passed each other and the tow in accordance with the signals of the Conemaugh, the New York, first swinging rapidly and violently to starboard and apparently turning some to port just before she struck, came on full speed and with her stem struck the Conemaugh with tremendous force on the starboard side, abreast the Texas, and almost immediately the Conemaugh struck the Canadian bank of the river, and filled and sank, the New York having cut deeply into her and crushed her side. That the signals of the Conemaugh, above mentioned, were of the proper and usual character, given by loud and distinct blasts of a good and sufficient steam whistle, but the New York throughout disregarded every one of said signals and ran over into and collided, at full speed, with the Conemaugh, without answering or heeding or herself giving any signals whatever.

That before and at the time of said collision, it was a

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED



quiet, calm and clear evening, lights could be seen a long distance away, and steam whistles could be heard at a great distance.

The libel thereupon charged specific faults against the New York, as follows :

1. In not keeping a proper and sufficient lookout.
2. In being in charge of incompetent, reckless and negligent officers.
3. In adopting and pursuing the course she did until close to the point where she would meet the Conemaugh and then in departing violently to starboard from said course.
4. In changing her course a second time and turning and swinging over and into and against the Conemaugh.
5. In not passing clear on the starboard side of the Conemaugh, or checking, stopping and reversing her engines before her actions made the same necessary.
6. In that, being the ascending vessel, she maintained her course, and in not checking her speed or stopping if, for any reason, she found it necessary or advisable not to proceed on the course she had previously adopted.
7. In not answering the Conemaugh's signals and in not giving the Conemaugh any signal whatsoever.
8. In disregarding the signals she had received from the Conemaugh. (2-3.)

Diagram No. 1 illustrates the averment of the libel.

The New York's answer averred (9):

Fourth. * * * The propeller New York was bound up said river, and when nearing the point in said river below where the River Rouge empties into the Detroit river, a steamer, with a tow of four barges astern of her, began to round from the Canadian side of the river to the American side, as though bound to a place known as Smith's coal dock, exhibiting to the New York her masthead and red side light, as well as the red side lights of the barges in tow as they came around. To this the New York blew a passing signal of one blast, at the same time checking her engine and reducing her speed to about four miles an hour, and then porting her helm so as to pass under the stern of the last barge. When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge, and when abreast of her quarter starboarded so as to go close under her stern. While passing under the stern of this barge, and not more than 10 or 20 feet from her, several short blasts of the whistle of the propeller, which proved to be the Conemaugh, were heard close at hand, and not more than 100 feet away. The Conemaugh pursued her course directly across the bows of the New York, which was then swinging under a hard starboard helm. A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done. Notwithstanding this, the Conemaugh, with considerable headway, continued on her course across the bows of the New York, so that the latter struck her stem on, on the starboard side, abreast of her forward gangway, and glancing along this side was swung by the Conemaugh nearly alongside. The New York immediately backed and passed

around the stern of the Conemaugh and offered her assistance. The Conemaugh then, however, was on the bank, and out of danger, and therefore refused the proffered assistance. That at the time the New York passed under the stern of the barge, she was not more than a length of herself from the Canadian bank. That no other passing signal was heard from any steamer after the exchange of the signal of one blast with the steamer having the tow, except the signal of two short blasts from the Conemaugh, and that when this was received the New York was close alongside of the last barge heading for the Canadian bank of the river, and in a position and on a course that no steamer could with safety pass her starboard side to starboard side, and if such a manoeuvre was attempted, a collision could best be avoided by swinging clear under a hard-a-starboard helm.

Diagram No. 2 represents the averments of the answer and cross-libel.

PROCEEDINGS IN THE DISTRICT COURT.

Libellant's witnesses, including the officers and crew of the Conemaugh, and a number of officers and men from the Burlington and her tow, and persons on shore, were examined in open court, and it was held that the collision occurred 900 or 1,000 feet from and a little on the port quarter of the stern barge of the tow, which barge was held to have been 800 or 900 feet from the Canadian shore, headed somewhat toward the American side of the river. The District Court held that a temporary departure of the New York from her course was necessary and justified by the presence of the tow, still there was ample room for her to starboard and resume her course, after passing the tow, which would have taken her astern of the Conemaugh; that this was a plain duty on her part which the master of the Conemaugh had a right to expect her to perform, his vessel having already "crossed the lawful path of the New York;" that the proofs established that the New York maintained double the speed of four miles stated in her answer until the vessels came together, and that she was grossly in fault and negligent in failing to see the lights and hear the signals of the Conemaugh; or seeing and hearing, guilty of even worse fault in disregarding them. It held that the faults of the New York were so many and flagrant that "it may be doubted if judicial records afford a parallel to the negligence and recklessness of her navigation."

Having found that the Conemaugh had in fact crossed the lawful course of the New York and was free from fault until the danger signal was blown, the court condemned the Conemaugh for failure to reverse; but on petition for re-

hearing, in view of the fact that collision was then inevitable and so expressly admitted in the answer, and in view of the then recent utterance of this court in the City of New York, 147 U. S. 85, the court modified its decree and exonerated the Conemaugh.

IN THE CIRCUIT COURT OF APPEALS.

The case was duly appealed by the owner of the New York, to the Circuit Court of Appeals, and that court, modifying only slightly the facts as found by the District Court and addressing its consideration to the three faults against the New York:

1st. In failing to keep a proper lookout and answer signals;

2d. In failing to keep her course; and

3d. In not stopping and reversing when there was danger of collision,

reversed the decree of the District Court, held the New York to be free from fault, dismissed the libel and ordered a personal decree against the Erie & Western Transportation Company, for the damages to the New York. Afterwards petition for rehearing was denied.

The Circuit Court of Appeals held that the Great Lakes and their connecting waters are so far "lakes and inland waters of the United States" as to be excluded from the International Regulations for prevention of collisions at sea, which had been adopted by the United States in 1885, (23 St. at Lg. 438), and in substantially the same form by the leading maritime nations, and which governed in Canadian waters.

The court held that it could not regard the Canadian Regulations without technical proof of the law, and applied to these vessels in Canadian waters not only the sailing rules found in section 4,233 of the Revised Statutes but Supervising Inspectors' Rule II, providing:

"When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth and fifth situations), they shall pass to the right of each other, as if meeting 'head and head,' or nearly so, and the signals by whistle shall be given and answered promptly as in that case specified."

Extending the Supervising Inspectors' rules to foreign waters, the court ignored the succeeding rule (3), and notwithstanding the provisions of that rule (quoted below), absence of lookout, ignorance of another steamer's presence in dangerous situation and relation, giving signals and displaying lights, the New York was excused on the ground that even had she seen lights and heard signals indicating a course and a purpose to cross her bow, the New York would still have the right to continue her speed in silence, ignoring the presence of the other steamer, her lights, her signals, her purposes, as fully as if she were not there.

Rule III provides :

"If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The Circuit Court of Appeals found :

"The New York was proceeding from the American side in a slanting direction across the river, while the Conemaugh was proceeding down the river in a slanting direction, and each must have been showing to the other but one (colored) light." (282)

"It is not disputed that the courses of the two vessels were crossing so as to involve risk of collision, and that the Conemaugh had the New York on her own starboard side." (278)

"The Conemaugh, therefore, being where she was, was either in or dangerously near, the course of the New York, and was not keeping out of her way. (281)

And although the steamers were on crossing courses, involving risk of collision, and the Conemaugh had signaled her intention to continue across the bows of the New York, and it was the duty of the New York to keep her course, the court held the New York justified in changing her course to starboard in the direction of the Conemaugh's course, because of the presence of the stern barges of the Burlington's tow, a temporary obstacle then moving toward the American shore out of the way of the New York, and which she might have avoided by checking or stopping and breasting the current. Upon this point the Court of Appeals in its opinion said :

"It is well settled * * that a vessel does not depart from her course when she turns from her general course to avoid obstructions, of which the vessel keeping out of her way must know the existence, and must allow for the effect. * * The proper course of the New York was that which the Conemaugh ought to have known she would naturally have taken had the Conemaugh not been in sight." (279)

The New York having changed her course on account

of said barges, was held not obliged immediately to resume her course after passing the last barge, the court saying :

"It is undoubtedly true that the New York's proper course after passing the tow, was to resume her general course up stream near midchannel. All the witnesses who observed her course, admit that just before the collision she was swinging under a starboard wheel. It would seem, therefore, that she had begun to change her course to port ; and the only question is, did she begin to do this as soon as she ought to have done it? * * She was not obliged to turn a sharp corner around the stern of the last barge in the tow. She certainly would not have done this had the Conemaugh not been there, and as we have seen, *her proper course could not be affected by the fact of the Conemaugh's presence.*" (280)

The available navigable channel between the tow and the Canadian bank as found by either court was sufficient for the safe navigation of the vessels (not less than 500 feet.) Each court held that it was the *lawful* course of the New York which the Conemaugh must regard and avoid. The district judge on this subject held that granting some alteration of course necessary and permissible to avoid the rear barges in the tow, such privilege could properly extend only so far as was reasonably necessary to avoid it, and having met the necessity, the New York must promptly resume her course.

The Circuit Court of Appeals hold practically that the New York owed no duty to the Conemaugh, and in departing from her course in a direction which tended to interfere with and thwart the Conemaugh's announced manœuvre for keeping out of the way, the New York might make the change as broad and resume her course as gradually, easily swinging back under slowly moving wheel, as if the Cone-

maugh was not on the scene, and, therefore the presence or absence of a lookout was immaterial, and that the burden on the Conemaugh was to keep out of such varying course of the New York, which on her part should be in no way circumscribed by the Conemaugh's presence or limited by any special circumstance.

POINTS OF ERROR.

I.

After the starboard hand rule has come into operation, with its burden and privilege respectively, is the privileged steamer so far privileged as to her course and speed that it is unnecessary for her, at night, to regard the lights and signals of the approaching steamer; and is she so far privileged that upon the intervention of a temporary floating obstacle, which she may avoid by checking and still hold her course as to the burdened vessel, that, though she chose to maintain her speed and alter her course in a manner and direction which must necessarily embarrass and may thwart the maneuver of the burdened steamer to clear, it is unnecessary for her to pay any heed to or give any notice to the burdened vessel of her intention?

II.

The decision of the Circuit Court of Appeals exonerates the New York, although she had no lookout or any competent watch, and was ignorant of the presence of a large steamer which had been displaying proper lights and blowing repeated signals until that steamer, with which she collides, was within a hundred feet and collision was inevitable, though the collision occurs while she is engaged in a conflicting change of course made, without notice, to avoid another moving vessel, after coming under the operation of a rule requiring her to hold her course, and without which change or with a smaller departure, which was possible, the collision would not have occurred.

III.

After the starboard hand rule has come into operation between two steamers, whether the intervention of another moving steamer is such a special circumstance as will permit the privileged steamer to alter her course, at night, without notice, in such manner as to conflict with the maneuver of the burdened steamer to clear, although it is clear that such privileged steamer may at the same time avoid the intervening vessel and hold her own course as to the burdened steamer by simply checking her speed?

IV.

Granting such right, should she make the least deviation necessary and come back as quickly as practicable, or may she make such deviation as if the vessel bound to keep out of her way were not in sight?

V.

Is the privileged vessel so far privileged that when the burdened vessel is "either in or dangerously near" the course of the privileged vessel, and is "not keeping out of her way," the privileged vessel need neither stop nor reverse, but having altered her course for a temporary moving obstacle, may turn back to midchannel gradually on an "easy sweep" regardless of the presence of the burdened vessel?

VI.

The statute requiring a steamer having another on her own starboard hand to keep out of the way, whether it is competent for the Supervising Inspectors to pass a supplementary rule requiring this to be done in a particular manner.

VII

The question of the extra-territorial force of the rules of the Supervising Inspectors, both vessels navigating in foreign waters.

VIII.

Whether the Great Lakes and their connecting waters are so far "lakes and inland waters of the United States" as to be excluded from the operation of the International Regulations for the prevention of collisions at sea, adopted by the United States in 1885 (23 St. L. 438).

IX.

The Circuit Court of Appeals held that it could not regard the Canadian sailing rules without technical proof of the Canadian law, and applied the rules found in Sec. 4233 R. S., and rule 2 of the Supervising Inspectors' rules, the latter requiring a steamer having another on her starboard hand to keep out of the way by porting. (Petition p. 9.)

An independent consideration of each point of error would necessarily involve a distinct analysis of the facts in reference to each. For convenience in presenting the case, and as more clearly showing the errors of which we complain and present, the argument will be divided:

- First:** The question of lookout and the holding of the court as to the proper course of the New York and their construction of the starboard hand rule.
- Second:** The channel between the Canadian shore and the rear barges of the tow available for the navigation of the vessels.
- Third:** Consideration of the positions and relation of the vessels at the blowing of the first, second and third passing signals of two blasts by the Conemaugh, and the movements of the vessels from the third signal to the time of the collision, presenting in connection with each consideration the law applicable to that situation, covering Points VI, VII, VIII and IX.

FIRST.

The question of lookout and the holding of the court as to the proper course of the New York and their construction of the starboard hand rule.

The duty of maintaining a proper and sufficient lookout has been so often stated, iterated and reiterated by the courts, is so plainly consonant with prudent seamanship, and failure to maintain so productive of disaster, that nothing but the clearest and most convincing showing that the result would or could not have been different if a proper lookout had been kept, is sufficient to exonerate a vessel failing in this duty. The obligation to maintain a competent lookout so stationed as to be afforded an unobstructed view of approaching vessels and the discovery of pending danger existed as a part of the common law of the sea before the enactment of sailing rules, and we believe is recognized by every maritime nation.

This obligation, however, as any other whether resting in express regulation, custom or prudent seamanship, is not arbitrary, although by reason of its importance it more nearly approaches arbitrariness than any other, and on the vessel remiss in this regard rests the burden of showing that the result would (or must) have been the same.

The New York was without competent lookout. Her answer admits an entire failure to note either the lights or signals of the Conemaugh. It states (9):

"When the New York had arrived at a point abreast of the last barge in tow, a signal of two whistles was heard, but being unable to see any vessel, and noticing only a white light close on the Canadian bank of the river, the signal of two blasts was not answered, as it seemed to be intended for some other vessel, the

New York being then close to the Canadian bank, and there not being room enough for any vessel to safely pass between her and that bank. The New York, therefore, still running slowly, continued on her course so as to go around close to the last barge and when abreast of her quarter starboarded so as to go close under her stern. While passing under the stern of this barge and not more than 10 or 20 feet from her, several short blasts of the whistle of the propeller, which proved to be the Conemaugh, were heard close at hand and not more than 100 feet away. The Conemaugh pursued her course directly across the bows of the New York which was then swinging under a hard a-starboard helm. A collision was then inevitable and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard a-starboard helm."

An uncontraverted fact in the case is that these vessels were on crossing courses;

"It is not disputed that the courses of the two vessels were crossing so as to involve risk of collision," (278); and,

"The Conemaugh, therefore, being where she was, was either in or dangerously near the course of the New York, and was not keeping out of her way," (281).

Both courts held that the New York's proper course after passing the tow was to resume her general course up stream near mid-channel.

The District Court held that she must deviate only so much as reasonably necessary and promptly resume her course, and so defining the lawful course of the New York, held that the Conemaugh was keeping out of the way and had crossed the proper course of the New York, in fulfillment of her statutory duty.

The Circuit Court of Appeals, speaking of the course, say:

"Her natural course would have been to swing gradually to port under a slowly turning starboard wheel, so as to make an easy sweep back to mid-channel" (280), and

"The proper course of the New York was that which the Conemaugh ought to have known *she would naturally have taken had the Conemaugh not been in sight.*" (279).

But even as to such a course, the Circuit Court of Appeals distinctly holds that the Conemaugh was either in or dangerously near it.

Taking up this question as the Circuit Court of Appeals presents it, the Burlington tow, in reference to which each of these vessels was navigating under proper passing signals, is treated as a fixed obstruction, and by mechanically applying the starboard hand rule and a misconception of the doctrine of the Delaware (161 U. S., 469), and the J. C. Hasbrouck (93 U.S., 405), the *privilege* of the favored vessel is converted into *license* as to course and speed without knowledge of the attending circumstances; license, which, by reason of a necessary departure from her course is so broadened as to authorize her to navigate free from obligation of any character which would not rest upon her, were she the only vessel afloat. This is the direct and positive declaration of the Circuit Court of Appeals; it is the logical result of the exoneration of the New York, in her failure to know the real situation, a fault, in this case, which can be condoned on no ground which does not lead to as illogical result.

Each of these vessels and the Burlington tow had a right to navigate the river; each owed some duty to the

other; the failure of one to meet that duty furnishes no justification for failure on the part of the other not placed *in extremis*. The privilege to the favored vessel is designed to prevent and not to promote collision, and a construction of the starboard hand rule which allows the favored vessel to wantonly continue her course and speed until they are *in extremis*, puts a premium on stubborn, stolid negligence or willful disregard of surrounding circumstances and compels the burdened vessel to navigate absolutely at her own risk, if at all.

Certainty in the obligation and privilege under the starboard hand rule is essential and doubt would be productive of disaster, but the privilege and the obligation each have their limitation. It has been clearly declared by this court:

"The preferred steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

The Delaware, 161, U. S., p. 469.

A competent lookout and watch on the New York would have known that there was a down-bound steamer above to which the Burlington had blown a passing signal of two blasts, since the New York was nearer to the Burlington when the latter blew to the Conemaugh than when the Burlington exchanged the single blast passing signals with the New York. They would have known that that passing signal related to the tow as a vessel under steam, and that whatever vessel the Burlington was blowing to must also pass between the last barge in tow and the Canadian shore. They would have known that the down-bound steamer intended to pass and not to stop in the bight of the tow,

since in that purpose no signal would be necessary or given, as a single blast signal would not have been necessary or given if they had purposed remaining below until the tow straightened up in rounding to. They would have known that if the situation of the tow made it necessary at that time for either the down-bound steamer or their vessel to await the manoeuvre of rounding to, they, (especially if navigating in ignorance of the starboard hand relation), must have known that the duty of waiting lay with the ascending steamer. They would have known that the descending steamer was on a crossing course as indicated by her lights, by the Burlington's signal, by the Cone-maugh's signals and by the fact that the only available channel lay between the tow and the Canadian shore. They would have known that the descending steamer must navigate in relation to their own vessel; that the two blast passing signals were blown to her and that they indicated a purpose to pass on her starboard hand, between her and the Canadian shore; if, as averred in their answer, that could not be done with safety, they knew by the repetition of the two blasts that the descending steamer did not observe any such difficulty. They would have known that as to their own vessel the other was burdened with the obligation of keep-out of her way, and if such difficulty existed would not be able to do it as her signals indicated she would try; that the descending steamer, under the burden of the starboard hand rule as to her, was not passing her to port, could not pass her to port and did not mean to try it. They would have known that the descending steamer was either on the course that the material surroundings made necessary and her

signals indicated or that these did not correlate with her position and heading, making the situation one of doubt.

What did she know? Nothing, as she claims, until collision was inevitable, but she is to be charged with knowledge of all the facts which a competent lookout should have known. What did she do? She maintained a speed double what she avers, and in perfect silence altered her course and so brought the Conemaugh, which had already crossed her proper course a safe distance away, again ahead and into collision, and so produced even the risk of collision.

But it is said that the New York was holding her course; that that was her proper and lawful course and the one the Conemaugh must be held to have known she would take and allow for. Such statement of the privilege furnishes a clear illustration of the necessity of giving a construction to the sailing rules that will further their purpose to prevent disaster and not invite it. If her proper course were that which she would naturally take "had the Conemaugh not been in sight;" if "her proper course could not be affected by the fact of the Conemaugh's presence;" if to avoid or pass a moving vessel with reference to which the meeting vessels are navigating, the moving presence of which had, in accordance with passing signals, placed them on crossing courses as to each other, the privileged vessel, fortunate also that she is breasting the current, may alter her course and then as if the burdened vessel were not there at all, swing gradually back under a slowly turning wheel, so as to make an easy sweep back to mid-channel, conditions which must vary with each different steamer and the whim of her navigator,

then the burdened steamer can have no safety but to tie up. The discretion, the liberty, the license placed with the privileged vessel is too great, too easy of abuse. One may expect and forecast a natural and reasonable manœuvre under the particular circumstances and act accordingly, but one may not tell what shall seem natural and reasonable to another who has full license in determining his "natural and reasonable manœuvre under the circumstance" to leave out of the account your very presence.

In speaking of an overtaken vessel altering her course to avoid a pilot boat, the overtaken vessel coming into collision with her later, Lord Esher, M. R., said :

"If the regulations had been applicable I should have thought that, when she was aware of a vessel coming up behind her, she had no right to break from her course, whatever that may mean, without being bound to look round to see where the other ship was at that time."

The *Banshee*, 6 Asp. M. L. C., 221-223.

The New York might at least have someone "to look round to see where the other ship was," even if not bound to regard her presence.

This is in no wise limited by the subsequent opinion of the Circuit Court of Appeals on petition for rehearing (86 Fed., 815), which was not included in the certificate, and presumably, therefore, not filed until later. In that the court loses sight of their definite findings as to the courses, the presence of the *Conemaugh* in or "dangerously" near the course of the New York, even as defined by the court, and overlook the found facts that the last barges in the tow, in the wake of which they say the *Conemaugh* was "swing-

ing slowly to starboard," were heading "two or three points towards the American shore from the course of the river and channel" (280), which, under the process of rounding to would broaden constantly. Being in their wake would place the Conemaugh in such relation to the tow and the New York as to refute the deductions of the opinion on rehearing, and we dismiss it from consideration.

We ask this court not to sanction or place such construction on the starboard hand rule as will compel withdrawal from navigation of a vessel which by force of temporary circumstances, such as a passing tow, may bring another on her starboard hand, but hold the burdened vessel to her duty under the statute certainly, and quite as certainly hold the privileged vessel to her correlative duty.

By reason of the tow, the privileged vessel here could not maintain her course and speed. She could have held her course by checking until the barges were drawn out of her way, and could have deviated enough to clear the barges without involving risk of collision with the Conemaugh.

SECOND.

The channel between the Canadian shore and the rear barges of the tow available for the navigation of the vessels.

Arguments in this case on either side are based upon opposing contentions as to material facts, and we therefore call attention to a well established rule of law, which, it would seem, should be invoked in determining the questions of fact.

Where a party has withheld the best evidence of a material fact claimed by him, or has not produced witnesses

whom he might have called, the presumption is that such evidence, if produced, would have been detrimental to, or would have disproved his contentions.

The *Vaderland*, 18 Fed., 736.

Clifton vs. U. S., 4 Howard, 246.

Gulf Co. vs. Ellis, 54 Fed. 481.

The libel and answer agree that the collision was close to the Canadian bank of the river, not more than the length of the New York (270 feet) therefrom.

The libellant claims that there was ample room for purposes of navigation to the eastward of the tail end of the tow, while the respondent claims that the New York passed only 10 or 20 feet from the last barge in the tow, and that there was not room for a vessel to safely pass her starboard side to starboard side.

The testimony is as follows :

The river left clear to eastward of tow is judged by Captain Miller (18) about 750 feet. Priest, lookout, (46), a broad expanse of water. Capt. Powrie, master of Burlington, (63-80), one-third of river (900 to 1,000 feet). Jordan, mate of Burlington, (83), 600 or 700 feet. Capt. Jeans, master of Amaranth, (87), 700 or 750 feet. Capt. Smith, of Ferguson, (96-99), one-third of river, 900 to 1,000 feet. Kelley, wheelsman, did not notice tail end of tow. Capt. Smith, of the Wesley, (129), one-third of the river. Merrill, wheelsman on the last barge, the Ferguson, (130), collision 1,000 feet away. Davidson, wheelsman on Wesley, (135-6), one-third of river. Hogan, second mate of Conemaugh, (141), lots of room; two and a half to three lengths, (625 to 750 feet.) May, watchman on Conemaugh, (158), about

1,000 feet. Crowe, deckhand on Conemaugh, (175), between one-quarter and one-half the river.

The length and position of the tow would make it impossible for the whole river to be virtually blocked. Miller, (25), tow half mile long. Powrie, master of the Burlington, gives length of vessels and tow lines as follows: (61), Burlington 145 feet, Wesley 150, Republic 148, Ferguson 135, Wesley's tow line 600, others from 500 to 300—2,428 feet. As the Burlington at time of collision was headed up stream getting lines out to Smith's coal dock, and at least her first barge in tow was also headed practically up stream, while the third and fourth barges were headed some down stream, the space must have been quite as great as any witness states.

There is no opposing testimony, and the district judge found that the space was 800 or 900 feet (53 F. 554).

From the above it appears that there was a sufficient channel for the New York and Conemaugh to have navigated in safety, as shown in diagram No. 1, and this should determine the case in favor of the libellant.

The practical ability of two such vessels to meet and pass with safety, in a space of that width, has been demonstrated by years of navigation on the lakes and their connecting waters. No artificial channel has been made by the government in these connecting waters as wide as that which was left open by the tow.

As illustrations:

The St. Mary's Canal, 3,500 feet long and varying in width from 100 to 300 feet. The new Hay Lake Channel Cut through Little Rapids, over four miles long with a

uniform width of 300 feet and with a cross current varying from three to five miles per hour at its upper end, where vessels must make a sharp turn of three and a half points in entering and leaving. The channel at the lower end of Hay Lake, and through what is called the government dyke, is 300 feet wide for a distance of about five and a half miles, with heavy cross currents, and one sharp elbow or turn of three and a half points. Just below this dyke is a natural channel only about 600 feet wide, where vessels have to make a turn of six points in a heavy current. Until the completion of the Hay Lake channel all navigation to Lake Superior passed through Lake George, with its long winding channel, 200 feet in width. The entrance to the St. Clair river from Lake Huron is a natural channel only 600 feet wide, in which there occurs a current of six or seven miles per hour. The natural channel at the lower end of that river is only 600 feet wide and very tortuous, terminating in the government cut, one and one-third miles long and 296 feet wide between piers. At the lower end of the Detroit river is the famous rock-lined Lime Kiln Crossing channel, which has been lately widened to 440 feet, to meet the requirements of the larger modern vessels.

Numerous other channels, canal and harbor entrances, which are intended to and do care for the needs of navigation, with a width of 300 feet or less, might be instanced, but it seems unnecessary to further demonstrate the proposition, that,

With the space that was open to the eastward of the Burlington's tow, there was nothing unusual, extraordinary or hazardous in one vessel undertaking to meet and pass another vessel therein.

The Conemaugh had been coming down the river at her usual speed of about 10 miles per hour (24) and on a course a little to the American side of mid-channel; her watch had made some bright lights ahead and on the Canadian side of them, and while trying to make these out they got a signal of two whistles from the Burlington, which was then near Smith's coal dock, about one-half mile away, (29), then so far around as to show her green and masthead lights, and the green light of the first barge in her tow, to the Conemaugh. The Conemaugh answered with two whistles, put her wheel hard-a-starboard, and at once checked. Miller, 16.

This was done because the master made up his mind that the white lights he had seen were on other vessels of that tow. He then took up his glasses and succeeded in clearly fixing the location of the tow. He says: (17) "When I found the tail end of the tow I was heading above them. There appeared to be plenty of room for me over there. I steadied the helm to follow the tow back." (20). "The vessel had to be steadied and then ported. At or about the time I steadied the vessel, in looking down the river, I discovered a bright and a red light heading apparently up the river."

The Conemaugh at once blew a signal of two blasts to this vessel which proved to be the New York. Capt. Miller saying: "Having directed my course across the river, I concluded it was the best policy to hang on to that course and leave him on the starboard hand."

As this brings us to the initial movement in the navigation of the Conemaugh, with respect to the New York, we

deem it material to get the positions of the boats and their bearings clearly fixed.

THIRD.

Consideration of the positions and relations of the vessels at the blowing of the first, second and third passing signals of two blasts by the Conemaugh, and the movements of the vessels from the third signal to the time of the collision, presenting in connection with each consideration the law applicable to that situation, covering Points VI., VII., VIII. and IX.

I.

The position of the vessels at the time the Conemaugh blew her first signal of two whistles to the New York, and the respective duties and obligations at that time, and whether the Great Lakes and their connecting waters are "lakes and inland waters of the United States" within the exception of the Act of 1885. 23 St. L. 438.

As illustrative of the situation shown by the undisputed testimony, we have prepared diagram No. 3. This diagram was prepared from the following data (in addition to the testimony already cited, fixing the distance out from shore of the last barge of the tow.)

Captain Miller (17), the New York was then a good mile away.

Captain Robert Smith (125), the New York then a half to three-quarters of a mile below us.

The Conemaugh was then heading at about right angles with the Canadian shore, as shown by Miller (16), Kelley (112), Hogan (138), and several other witnesses. The location of the tow in this diagram is obtained from the testimony of Miller (25), Captain Powrie (62-66), Captain L. P. Smith (96), Captain Robert Smith (125-126).

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

The answer of the New York fixes her course as directed close to the tail end of the tow so as to pass only 10 or 20 feet away from the stern barge.

Captain Jeans, of the Amaranth, next to the last vessel of the tow (87), says : "He was heading pretty near for me."

Q. How long did he continue to head so for you ?

A. I would judge about 10 or 15 minutes.

Captain Smith, of the Ferguson, last in tow (98), says : "He came along up till he was abreast of the Republic, which was ahead of the Amaranth, then he was showing the three lights, apparently coming straight for us."

Captain Miller's idea and intentions in the then situation are clearly shown by his testimony on cross examination (32):

Q. You swung around across the stream under a checked motion. What was your idea when you got across that stream, with your engine moving at half speed, as to other vessels coming up the river; what they were going to do ?

A. I was to keep over to the American (Canadian) side and give them plenty of room.

Q. Suppose you crossed their path to go over there, too close aboard to get by ?

A. If I could cross it it was all right.

Q. And if you could not it was at your peril.

A. No, sir, *there was no doubt in my mind but what I could cross their path.*

Q. *Whose path are you talking about ?*

A. *I am talking about the steamboat that I saw down below there at that time, after I had starboarded the wheel.*

THE LAW APPLICABLE.

The Court of Appeals holds that the Great Lakes and connecting waters are to be regarded as "lakes and inland waters of the United States," and so within the exception to the repealing clause of the Act of 1885, and therefore that Section 4233, Revised Statutes, furnishes the navigation rules applicable to this case.

The North Star, 62 Fed., 73.

The question is whether the Great Lakes are to be considered as "*lakes and inland waters of the United States*," or as *coast waters*, or *high seas*, within the meaning of the Act of 1885, 23 St. L. 438.

The construction given by the Court of Appeals to the words, "lakes and inland waters," is inconsistent with the construction placed by this court in *Moore vs. Transportation Co.*, 24 How., 1, upon almost the identical words in the "Limited Liability Act," Revised Statutes, 4289. It is also inconsistent with the decisions of other courts construing these words.

American Transportation Co. vs. Moore,
5 Mich., 368.
The Garden City, 26 Fed., 766.

In each of these cases it was held that the words "lakes and inland waters" do not include the Great Lakes.

In the Seventh Circuit it was held by the District Court that the law of 1885 did apply to the lakes.

The Robert Holland and Parana, 59 Fed., 200.

It was affirmed without discussion as to this point. 70 Fed., 113.

In *Moore vs. American Transp. Co.*, 24 How., 1-37, the magnitude of lake commerce at that time (1851) is

described. In a report presented to the House of Representatives by the Secretary of the Treasury (55th Cong., 2d Session, Document No. 277) it is shown that the tonnage of the lakes has trebled; that is to say, it has increased from 450,000 in 1868 to 1,350,000 in 1897. In transmitting the document, the secretary says:

"Compared with the shipping tonnage employed in the foreign commerce of the United States, the activity of the lake shipping is far greater. The bulk of transactions in the lake-carrying interests is so large as to rank it among the great conveyers of the world."

This court has already referred to the Great Lakes in this language:

"These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other."

The Genesee Chief, 12 How., 443-453.
Craig vs. Continental Ins. Co., 141 U. S., 638.

In Ill. C. R. R. vs. Illinois, 146 U. S., 387-435, the court said:

"These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas."

And again (437):

"That the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over the ownership of lands under tide waters on the borders of the sea, and that lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations."

Speaking as to the term "high seas," as used in section 5346, R. S., the court said, 150 U. S. 261:

"The more reasonable inference is that congress intended to include the open, unenclosed waters of the lakes under the designation of high seas. The term, in the eye of reason, is applicable to the open, unenclosed portion of all large bodies of navigable waters, whose extent cannot be measured by one's vision, and the navigation of which is free to all nations and people on their borders, by whatever names those bodies may be locally designated. In some countries small lakes are called seas, as in the case of the sea of Galilee in Palestine. In other countries large bodies of water, greater than many bodies denominated seas, are called lakes, gulfs, or basins. *The nomenclature, however, does not change the real character of either*, nor should it affect our construction of terms properly applicable to the waters of either. By giving to the term 'high seas' the construction indicated, there is consistency and sense in the whole statute, but there is neither if it be disregarded. If the term applies to the open, unenclosed waters of the lakes, the application of the legislation to the case under indictment cannot be questioned, for the Detroit river is a water connecting such high seas, and all that portion which is north of the boundary line between the United States and Canada is without the jurisdiction of any state of the union."

Then on page 263,

"There are vessels of every description on those inland seas now carrying on a commerce greater than the commerce on any other inland seas of the world."

And on page 266:

"It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a state, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which

cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or states or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. *And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.*"

These are waters reached from the ocean, and by treaty the artificial canals used to avoid natural obstructions are open to the use of our own people and the people of Canada, and we submit do not fall within the exception of "harbors, lakes and inland waters of the United States."

But taking the rules of 1864 as governing (sec. 4233):

Rule 19. "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

Rule 21. "Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse."

Rule 23. "Where by rules 17, 19, 20, 22, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24."

Rule 24. "In construing and obeying these rules due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case, and render departure from them necessary in order to avoid immediate danger."

With the boats in this situation, the Conemaugh had an active duty to perform in keeping out of the way of the New York, and the New York had an equally imperative

duty to keep her course ; each had a right to rely upon the other's performance of its duty.

The Delaware, 161 U. S., 467.

"Safety of navigation depends essentially upon the certainty which results from exact adhesion to general and well-known regulations."

The Emma Kate Ross, 41 Fed. Rep., 828.

Citing,

The Sunnyside, 1 Brown's Adm., 227, F. C. 13620.

The Clement, 2 Curtis, 363, F. C., 2879.

The Gitana, L. R., 2 Adm., Ecc., 350,

The Ariadne, 13 Wall., 475.

The New York's duty, as to course, was to continue as she was then going, unless it became necessary to depart from that course to avoid impending peril or any immediate danger, *and in that event her departure must only be to the extent that the immediate danger reasonably demands.*

The John L. Hasbrouck, 93 U. S., 408.

With the general duty resting upon each of these boats, it would seem that the paramount question in determining which violated her duty, might be reached at once in the question of fact as to where the collision occurred.

The question of the space for navigation between the tow and the Canadian shore has been considered. Respondent, unwilling to accept the fact or present the case upon the established fact that the space was eight or nine hundred feet, of which six hundred was available to these steamers, argues that the Conemaugh should have remained above the tow, either by stopping entirely or drifting down with the current until the New York should have passed up.

There is something in the proposition that the vessels

should not have attempted to pass if the space were as narrow as the answer alleges. But even upon such a theory of the case, it is not the *Conemaugh* which should be condemned for not remaining above, but the New York for attempting to go up.

It is a well established doctrine that when such an obstruction is presented, it is the duty of the steamer ascending, breasting the tide or current, to stop until the vessel proceeding with the tide or current, shall get out of the way, because of the greater facility with which the ascending steamer can control her movements.

The Galatea, 92 U. S., 439.

This advantage in the ascending steamer and the rule of law which grows out of it, are recognized in other cases; and in rule 24 of the rules governing the navigation of the Great Lakes, adopted in 1895, and have long been recognized in rules 1 and 3 of pilots' rules for western rivers.

It hardly seems reasonable in view of this well established doctrine that the New York may rush up into danger and shift the burden and responsibility onto the descending steamer, on the ground that the New York, by the grossly negligent inattention and fault of her watch, did not know of the presence of the descending steamer.

We refer to this contention of the New York as showing the unwillingness of the respondent to accept and argue the case upon the established fact as to space left for navigation, and as showing that respondent seems to be governed by the belief that, in some way, the negligence of the New York in failing to note the presence of the other steamer in her vicinity, would, in law, put upon the other

steamer the duty of insuring the New York against the consequence of her own inattention; and this while the descending steamer was exhibiting proper lights, distinctly seen by everyone except the watch of the New York, and advertising her presence and announcing her intention by appropriate signals of a steam whistle, heard by everyone except the watch of the New York; lights and signals which must have been seen and heard by an attentive watch on the New York.

But we present our argument as to the duty and conduct of the two steamers when the Conemaugh's first signal was blown to the New York, based upon the conditions of navigation as fixed by the uncontradicted testimony and illustrated in diagram 3.

Respondent seems to contend that if there was such space it was the duty of the Conemaugh to pass between the New York and the tow, leaving the New York to port, under rule 18, that if two vessels under steam are meeting end on or nearly end on, each shall port her helm, and Inspectors' rule 2, that when steamers are approaching in an oblique direction, they shall pass to the right of each other as if meeting head and head or nearly so, and give signals as in that case specified.

This contention ignores entirely the then course and heading of the Conemaugh, which was at that time under way. The Conemaugh, at first uncertain of the nature of the tow which was rounding to, had just starboarded and come on a course substantially across the river. The Conemaugh and New York were on crossing courses, a situation governed by statutory rule 19, which required the Cone-

maugh to keep out of the way, and the complementary rule 23, requiring the New York to hold her course, both which rules are qualified by rule 24, requiring, generally, such precautions as the peculiar circumstances may in any case demand.

Rule 18, for meeting head and head, clearly did not apply. Inspectors' rule 2 did not apply, for the double reason that that rule is simply an extension of rule 1, not intended to apply to vessels on crossing courses, but to vessels, which although not strictly meeting end on or nearly so on substantially opposite courses, are approaching on oblique and converging courses, and only when vessels are near enough to involve risk of collision, which the rule seems to fix at one-half mile, while the situation at that time clearly involved no risk of collision, and the vessels were not less than a mile apart.

The Delaware, 161 U. S., 467.

The master of the Conemaugh had, with the aid of his glass, just located definitely the last vessel in the tow; he was observing critically the space between the tow and the Canadian shore; he saw the mast-head and red light of the propeller New York, and recognized her as a steamer coming up the river. He was then chargeable with knowledge of her proper course, which is agreed in pleading and in the testimony, would be such as to take her close by the tow, leaving no room between the proper course of the New York and the tow for a vessel to pass. This is stated in the answer. Although the master of the Conemaugh might not be able to determine at the time whether to accomplish this the New York would alter her helm, he was chargeable

with notice that if she came on, it was her duty to change only sufficiently to carry her clear of the tow, resuming her course up the river promptly after clearing.

The *John L. Hasbrouck*, 93 U. S., 408.

It was the right and the duty of the *Conemaugh* to assume that the *New York* would perform her duty in that respect.

The *Delaware*, 161 U. S., 468.

Since the space for navigating was so great that the master of the *Conemaugh* could only be justified in concluding that the ascending vessel would not remain below, the duty resting upon the *Conemaugh* was clear and unmistakable to keep out of the way of the *New York* by directing her course to pass in toward the Canadian shore and out of the legal course of the *New York*. In this decision there could be no fault had the vessels been in such proximity that necessity for precautions, other than the proper determination of the conditions of navigation and the duties of the vessels in respect to passing, had arisen.

The respondent, assuming that the Inspectors' rules applied and had come into operation, contends that they required the *Conemaugh* to port her helm, regardless of the tow and the physical obstruction it presented so close to the *New York's* course. The proposition is thus made that the duty of the *Conemaugh* was to take the pathway which was, by law, given to and imposed upon the *New York*.

This contention is open to two objections.

First. Statutory rule 19 leaves it optional with the steamer required to keep out of the way, to do it in such manner as she may choose, fixing upon her the imperative

obligation to get out of the legal course of the privileged vessel; at the same time, rule 23 makes it entirely safe for her to depend upon the privileged vessel pursuing her lawful course. Any rule taking away this option and requiring this to be done in a certain manner would be in derogation of the statutory rule and so far as inconsistent with it, invalid.

The B. B. Saunders, 25 Fed., 727.

The Atlas, 4 Ben., 27 F. C., 633.

The Transfer No. 4, 44 Fed. Rep., 303.

The Ottoman, 74 Fed. Rep., 316, 319.

Second. Rule 24 requires that in observing the rules due regard must be had to the special circumstances.

The Sunnyside, 91 U. S., 208-222.

"Cases arise in navigation where a stubborn adherence to a general rule is a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collision, but to save life and property by preventing such disasters."

And, quoting the language of Judge Benedict :

"She (the vessel having the other on her starboard side) was at liberty to keep out of the way of the Kate by porting or by starboarding, as the case required, and it was a fault in her to port, if starboarding afforded the only opportunity of avoiding the disaster."

The Atlas, cited above.

Cases cited below in support of the contention of respondent are entirely beside the question.

The Johnson, 9 Wall., 144-146, was decided before there were any Inspectors' rules, and before statutory rule 19 was enacted, and under somewhat different rules as the report shows. But beyond this, the diagram at p. 149 of

the report shows the vessels approached on slightly oblique courses, virtually head and head, because the divergence in their courses is due to a bend in the river, and further, that the reasonable and prudent course would have been to port the helm, there being nothing to interfere with that manœuvre.

See *The Clarion*, 27 Fed., 128.

The same remarks apply to the *Grand Republic*, 16 Fed. Rep., 424, the court there holding the Inspectors' rule not necessarily so in conflict with the statutory rule giving the vessel bound to keep out of the way the right to exercise her discretion, as to render the Inspectors' rule void, in a case where, as the court said, "*there was nothing to make it necessary to depart from this rule.*"

The proposition that the lawful course of the *New York*, if pursued, brought her so close to the tow, and thence up the river in such a line as to make it physically impossible and highly improper for the *Conemaugh* to attempt to pass in that way is not attacked by any testimony and is expressly admitted in the answer.

II

The position of the vessels at the time the *Conemaugh* blew her second signal of two blasts to the *New York*, and the obligations at that time; the question of the extra-territorial application of the Supervisors' Rules; the Canadian statutes governing, and whether the court should regard the Canadian law without technical proof.

We particularly call the court's attention to the following testimony of Captain Miller, direct examination. (17).

A. Having directed my course across the river, I con-

cluded it was the best policy to hang on to that course and leave him on the starboard hand.

Q. He was, of course, on your starboard hand in the situation you have described?

A. Yes, sir.

Q. What did you next do?

A. I gave him a signal of two blasts.

Q. And at the time of giving that signal of two blasts the second signal of two blasts, what lights did you see then on the New York?

A. *The masthead, the red and the green.*

Q. What is your impression, estimate, about the distance which separated the two vessels at that time; the second signal of two blasts?

A. Somewhere in the neighborhood of three-quarters of a mile, I think.

(18)

Q. You were then proceeding on what course; how were you heading with reference to the Canadian shore or the trend of the river?

A. A trifle down the stream.

Q. How much down stream would you say your course was taking you then from right square across?

A. Less than 45 degrees, I think.

Cross-examination by Mr. Wisner. (36).

Q. And you took that position, because you firmly believed that there was room enough to get across his bow before he could reach you if he kept in that way?

A. Yes, sir.

Q. Did it occur to you—I will ask you again—at that time when you were considering the rights of the New York, and your own obligation, what was to be done with this string of three barges between you and the New York?

A. I had got down (done) with them, I had found the tail end of them.

Q. *But what did you think the New York was going to do with them?*

A. *He was going to have plenty of room to pass between us and the tow.*

Q. *Then your notion was that the New York was to*

come on and pass between the Conemaugh and the rear barges of the tow?

A. Yes, sir.

* * *

Q. You had got on a course that would certainly clear you, so far as the stern barges were concerned?

A. Yes, sir.

Q. So any anxiety you might have had was disposed of when you had accomplished that? Isn't that so? Any anxiety you may have had with reference to that tow and her barges you had gotten rid of by getting your boat around so that you would steer clear of them?

A. Yes sir.

Q. When you blew the New York that signal of two blasts your mind was perfectly easy?

A. Just before I blew it, no.

Q. Blowing it did not disturb you?

A. I had to get out of his road then. He had the right of way.

Q. He was a mile away?

A. At that time he was not showing only his red light.

Q. Did that induce you to repeat your signal any quicker than you would if he had been showing you both his lights?

A. Yes, sir.

Q. Then you hadn't waited as long as you usually wait?

A. No, I think not.

Q. And you repeated that signal of two blasts to him, and about that time he showed you both of his lights?

A. Yes, sir; at that time I got a glimpse of both.

Q. Did he open it or did you open it?

A. It appeared I was opening it.

Q. You think you were opening it?

A. Yes, sir.

Q. Now, the failure of the New York to answer your first two blasts did not cause you to make any change in the course of your vessel?

A. No, sir.

* * *

Q. And you blew him another two about the time you opened the starboard light.

A. Yes, sir.

Q. Standing on the same course across the river?

A. I think by this time we had started to follow the tow back again.

Q. Had you steadied?

A. Steadied, and after they steadied, followed the tow back again.

Court: You had ported when you sounded the second signal of two blasts?

A. Yes, sir, we swung the port wheel slow.

Mr. Wisner.

Q. When did you give that order to port?

A. Soon after steadying, when I found we were heading up the river above the tow, then I sung out, steady, follow them back, follow the tow back so as to keep that distance off of them.

Q. With reference to blowing the first two blasts, when was the helm ported?

A. It was at or about that time.

Q. Then, in fact, when you were in that condition or anxiety of mind, seeing the port and the masthead light of the propeller New York, and realizing your duty to get across his bow, get out of his way, you ported your helm instead of keeping on and getting out of his way? Is that what you mean to say now?

A. Then I was swinging slowly under a port helm.

Q. When you opened his starboard light, you knew how he was heading, didn't you?

A. Yes, sir.

Q. And you blew him two whistles again?

A. Yes, sir.

* * *

Q. Than his failure to answer you didn't make any difference with the navigation of your boat, did it?

A. No, sir.

Mr. Hogan, second mate of Conemaugh (139).

Q. Now, Mr. Hogan, how much did your vessel port, in your best judgment, we will say from the heading directly across the stream?

A. Well, I should say somewhere between three or four points.

* * *

Q. Was there any answer to your first signal of two blasts?

A. No, sir, not that I heard.

Q. When that signal was repeated, as you now state, did you then look down to see what you were signalling to?

A. Yes, sir.

Q. What did you see?

A. I saw a propeller down the river below this tow.

Q. What signal lights was that propeller exhibiting to you?

A. Two colored lights and a headlight.

Kelley, Wheelsman (112):

Q. Under that order, port a little, follow the tow, what did you do, if anything, with your wheel?

A. Well, I gave her about half a turn to port, to let her come around easy.

Q. What was the next order that you got?

A. The next order was steady. We had got around, and we were slanting down the river.

Q. How much do you think you were slanting down from straight across the river when you steadied her at that time?

Mr. Kremer: After porting?

A. After we ported we steadied.

Q. I know, and you say you were slanting across the river; how much were you heading down from straight across?

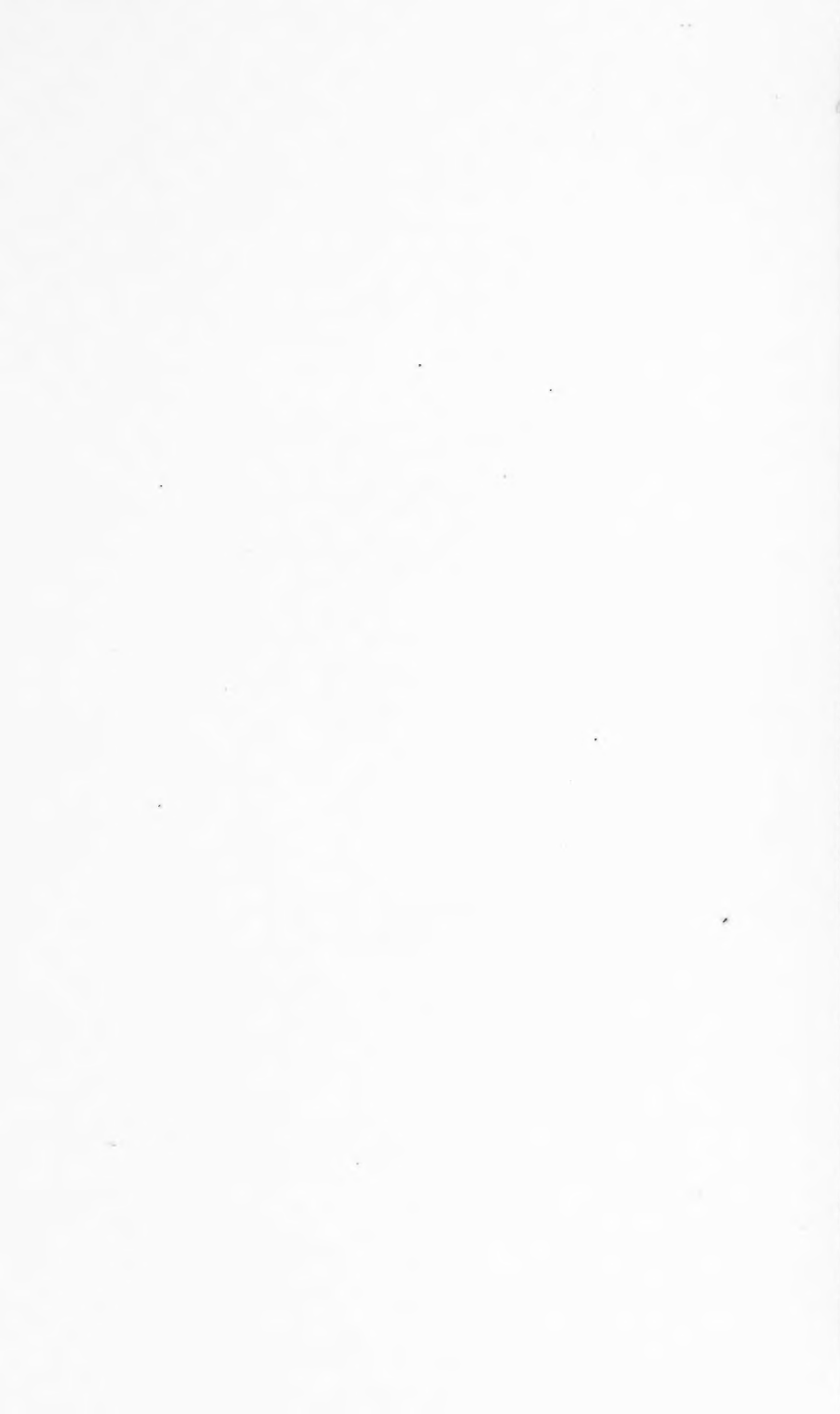
A. I should say about two or three points.

In addition to this testimony the following established facts are cited:

First, the speed of the New York was about ten miles an hour, or twice that of the Conemaugh.

(Record, 19, 65, 99, 125, 131, 134, 192.)

Second, the speed of the Conemaugh was about four and a half miles per hour. Black, engineer (121).



Third, the tail end of the tow was doing little more than drifting with the current, which is about one and three-quarters or two miles per hour. Record, 87, 105, 183, 191.

From the above data we have prepared a drawing showing the positions of the boats at the time that the master of the Conemaugh blew this second signal of two blasts to the New York.

See diagram No. 4.

THE LAW APPLICABLE.

At and from this time the Conemaugh was navigating wholly in Canadian waters. The provisions of the Canadian statute are similar to those of our act of 1885.

We contend that the Supervising Inspectors' rules have no extra-territorial force or application;

That in event of collision the law of the place must be looked to for the rules governing; that by the law of Canada the Conemaugh was not only justified in her maneuver at this time, but she acted in strict accord with its requirements;

That if the Supervising Inspectors' rules apply, the Conemaugh was justified in her maneuvers, and their only effect would be to further condemn the New York.

The Board of Supervising Inspectors is created by Title 52 R. St., U. S. The act prescribes their powers and duties; declares what vessels are subject to the act, and when and where so subject.

Chapter 1 begins with Sec. 4399 and ends with Sec. 4461. Section 4400 provides that

"All steam vessels *navigating any waters of the United States* which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this Title."

Section 4401 provides that

"All coast-wise sea-going vessels and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels propelled in whole or in part by steam *and navigating as aforesaid* (i. e., within the jurisdiction of the

United States,) shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, *as provided by this Title.*" * * *

By section 4412 it is provided that

"The Board of Supervising Inspectors shall establish such regulations to be observed by all steam vessels in passing each other, as they shall from time to time deem necessary for safety." * * *

Section 4405 :

"The board shall establish all necessary regulations required to carry out, in the most effective manner, the provisions of this Title, and such regulations, when approved by the Secretary of the Treasury, shall have the force of law."

The board established eleven pilot rules (general rules and regulations prescribed by the Board of Supervising Inspectors of Steam Vessels, as amended January, 1891, pages 53, 54 and 55).

Section 4412, and the rules of the inspectors, must be read and construed with section 4401 :

"all vessels propelled in whole or in part by steam and navigating as aforesaid," (within the jurisdiction of the United States,) "shall be subject to all *the rules and regulations established in pursuance of law for the government of steam vessels in passing as provided by this Title.*"

thereby subjecting such vessels to rules established in pursuance of the title. when "*navigating any waters of the United States,*" and then only.

Marsden on Collisions, at page 209, states the general rule,

"That as to rights and merits, the law of the place of collision (*lex loci*) and as to remedies and procedure, the law of the tribunal (*lex fori*) is to prevail."

Story, "Conflict of Laws," chapter 14, paragraph 558, (7th ed.), p. 702, says:

*"In regard to the merits and rights involved in actions, the law of the place where they originate is to govern. * * ** But the forms of remedies, and the order of judicial proceeding, are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties or origin of the right, or the country of the act."

See also 1 Parsons on shipping and Adm., 529.
The M. Moxham, L. R., 1 P. D., 107.

Cooley on Torts, 471.

Smith vs. Condry, 1 How., 28.

The Scotia, 14 Wall., 117.

The Delaware, 161 U. S., 459.

The Scotland, 105 U. S. 24-29.

Turner vs. St. Clair Tunnel Co., 111 Mich. 578.

The requirements of the Canadian statute applicable to the situation in which the Conemaugh found herself are as follows:

"Art. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

"(a) This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

"(b) The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which by day each ship sees the masts of the other in a line, or nearly in a line

with her own ; and, by night, to cases in which each ship is in such a position as to see both the side lights of the other.

“(c) It does not apply by day to cases in which a ship sees another ahead crossing her own course, or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

“Article 16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

“Article 18. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary.

“Article 19. In taking any course authorized or required by these regulations, a steamship under way *may* indicate that course to any other ship which she has in sight by the following signals on her steam whistle, that is to say :

“One short blast to mean, ‘I am directing my course to starboard’;

“*Two short blasts to mean, ‘I am directing my course to port’;*

“Three short blasts to mean, ‘I am going full speed astern.’

“The use of these signals is optional, but if they are

used, the course of the ship must be in accordance with the signal made.

"Article 22. When by the above rules one of two ships is to keep out of the way, the other shall keep her course."

The above requirements were, we submit, the ones in force from the time the *Conemaugh* and the *New York* were sufficiently near each other to involve any risk of collision. These rules are the outcome and the recommendations of the International Congress which was called to frame and recommend such rules as time had proven most safe and practicable, and whether this is held to be the law by which the *Conemaugh's* actions are to be measured or not, it is clear that Captain Miller's actions are thereby indorsed as good and prudent seamanship.

The Circuit Court of Appeals held that there was not sufficient technical proof of the Canadian statute as a foreign law, but it is clear from the opinion that the statute was in fact before the court, and our contention is that a court of *Admiralty* will take judicial notice of foreign regulations for the prevention of collisions without such technical proof as might be required by a common law court in an ordinary action.

Talbot vs. Seeman, 1 Cranch, 1.

The Scotia, 14 Wall., 170-186.

Marsden on Collisions, 310-340.

Wharton on Conflict of Laws, Sec. 771.

Wharton on Evidence, Secs. 285, 331.

But if the rule is otherwise, then, in the absence of technical proof, the general maritime law will be presumed

to exist in Canada, and under that law the *Conemaugh* was not obliged to port and go astern of the *New York*, but might cross her bows at a proper distance ahead.

The Canadian statute which was before the Circuit Court of Appeals is printed in *Howell's Admiralty Practice* (Canada), p. 239, where the author states in a footnote:

"The Imperial Regulations upon which these are founded, and which came into force 1st September, 1884 (Order in Council, 9 P. D., 248), apply to British, and by international assent, to French, Italian, Greek, Portuguese, Norwegian, Swedish, Brazilian, Turkish, Chilian and Danish ships and boats (*Marsden's Law of Collisions at Sea*, 3d Ed., 358). The United States have adopted regulations very nearly corresponding."

In the report of the Commissioner of Navigation for 1885, at p. 136, the Commissioner says:

"This code, which is now accepted as an integral part of the law of the sea, embodying the 'rule of the road,' in so far as navigation outside of the territorial waters of this country is concerned, was formally adopted by the United States Congress March 3, 1885. The attention of all persons concerned was immediately directed to the changes in the steering and sailing rules made by the act referred to, by a circular issued from this office under date of March 25 following (Treasury Department No. 40), which contained the new act printed side by side with the old law. The text of the Revised Regulations, which, although observed by all vessels on the ocean, is now given the sanction of law in the navigation of public and private vessels of the United States upon the high seas, and in all coast waters of the United States except harbors, lakes and inland waters, is subjoined."

In *Gould & Tuckers' Notes*, Ch. 5 (Navigation), p. 785, speaking of the rules fixed by Sec. 4233, R. S., it is said:

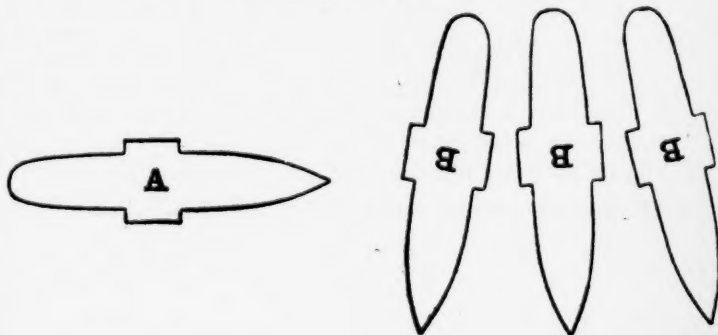
"These rules were adopted by more than thirty of the principal states of the world, and were at once regarded as entitled to judicial notice. The *Scotia*, 14 Wall., 170; 3 Blatch., 308; The *Sylvester Hale*, 6 Ben., 523. The Revised Code was adopted by Great Britain in 1884, and this and the regulations of 1863 are set out in parallel columns in Marsden's *Law of Collision* (2d. ed.), 471-485. This Revised Code has been adopted by the leading nations, and is the act of March 3, 1885, ch. 354 (23 St., 438)."

In the situation shown by diagram No. 4, the vessels are not in position to demand the application of rule 2 of the Supervising Inspectors, but in that situation the Inspectors expressly instruct masters that they shall *not* undertake to pass port to port, quite aside from any such conditions as that presented in this case, by the presence of the tow.

The Supervising Inspectors, in connection with their rules, say: "The following diagrams are intended to illustrate the working of the foregoing system of colored lights, and are to be used by pilots in connection with the rules, as sailing directions on meeting or nearing other steamers."

See situations pictured by inspectors.

The seventh situation is precisely that in which the *New York* and *Conemaugh* are placed.



Let the vessel marked "A" by the Inspectors represent the New York and "B" the Conemaugh, and in their instructions substitute these names for the letters used by the Inspectors. The situation shown in our diagram 4 is described and instructions thereby furnished to both the Conemaugh and New York as follows:

"In this situation the steamer New York will only see the green light of the steamer Conemaugh in whichever of the three positions that the latter may happen to be, because the red light will be hid from view. The New York will be assured that the starboard side of the Conemaugh is toward him, and that the latter is therefore crossing the bows of the New York in direction to starboard. The New York will therefore (if so near as to fear collision) starboard his helm with confidence and pass clear. On the other hand, the Conemaugh, in either of the three positions, will see both the red and green lights of the New York, by which the former will know that a steamer is *approaching directly toward him*. The Conemaugh will act accordingly, and *keep away if necessary*."

Thus if we are to look to the Inspectors for guidance, we find assurance given to the Conemaugh that the New York would not port.

After blowing this second signal the Conemaugh continued on, and some criticism is offered on the ground that "not hearing a reply from the New York, the captain of the Conemaugh should have construed that as a dissent." In this situation, we do not see why a failure to answer should be construed into dissent. The Conemaugh knew what the passive but imperative duty of the New York was

and had a right to navigate in reliance upon performance of that duty.

The Emma Kate Ross, 41 Fed. Rep., 828.

The John King, 49 Fed. Rep., 469.

The John L. Hasbrouck, 93 U. S., 408.

The Delaware, 161 U. S., 461-467.

If the law of Canada applied, signaling by whistle is optional and solely to indicate what the person signaling is going to do. The provision is, "the use of these signals is optional, but if they are used, the course of the ship must be in accordance with the signal made."

Criticism of Captain Miller for assuming to proceed in reliance that the New York would fulfill her duty and keep her course, even though she did not signal, is answered by the language and cases quoted with approval by the Supreme Court in the *Brittania* (153 U. S., 143) as follows :

"The officers of each vessel had the right to assume that the other vessel would do its duty, and to make their course and keep their speed on that assumption."

Hutchins vs. Northfield, 24 L. C. P. Co., Rep., 680-681.

In the case of the *Elizabeth Jones*, 112 U. S., 514-523, it was said :

"Conceding it to have been the duty of the *Willis*, under article 12, to keep out of the way of the *Jones*, it was equally the duty of the latter not to baffle or prevent the efforts of the *Willis* to that end. Her departure from the requirement of article 18, that she should keep her course, cannot be justified under article 19, because there were no special circumstances which rendered such departure necessary in order to avoid immediate danger."

In *Belden vs. Chase*, 150, U. S., 699,

"Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and should not be encouraged to treat the exceptions as subjects of solicitude rather than the rules."

In *the Free State*, 91 U. S., 200,

"It is the duty of a steamer to keep out of the way of a sailing vessel when they are approaching in such directions as to involve a risk of collision. The correlative obligation rests upon the sailing vessel to keep her course, and the steamer may be managed upon the assumption that she will do so."

In *the Britannia* case, the court further said, p. 144,

"It is true some of the cases just cited were cases wherein the vessel whose duty it was to keep her course was a sailing vessel, yet the principle involved is the same in the case of two steamships crossing, where it is the duty of the one who has the other on her starboard bow to keep out of the way of the other, and of the latter to keep on her course."

It must be conceded that the *Conemaugh's* crew were properly stationed and on the lookout; a full watch of competent and experienced men, exercising their best judgment.

Let us look at the *New York* as she is presented to the court, just after having this second signal blown to her by the *Conemaugh*. The answer states that the officers of the *New York* neither saw the lights of the *Conemaugh* nor heard her whistles, and charges that the *Conemaugh* neither had the proper lights nor blew proper passing signals (13.) Fault is charged against the *Conemaugh* as follows: "In not carrying the lights required by law brightly burning and properly displayed." Also, "in not blowing proper passing signals." This was in answer to the libel which charged the *New York*. (1), "In not keeping a proper and suffi-

cient lookout." (2) "In being in charge of incompetent, reckless and negligent officers." These were serious charges, and when a party considers it wise to resort to ingenious argument to repel them rather than let the court see and judge of the crew and hear their story and sworn excuses, it amounts to a confession that the allegations of the libel could not be refuted. Where so much depends upon questions of fact, such a defense, as that instituted for the New York, is so colored with suspicion as to call for no guessing in its favor. In the court below, respondent offered its first excuse for not seeing the lights of the Conemaugh. They put the crew of the New York behind imaginary high lumber piles on the barges, and went so far as to refer to record page 110, as showing "lumber cargoes piled high above the rail," to support the excuse. The testimony was as follows :

Q. Your deck load, you stated, was ten feet above the deck, or rail?

A. Above the deck.

Q. Making the top of your deck load how high above the water?

A. Eleven feet. (110)

The height of the Conemaugh's colored lights (being the lower ones) was drawn out on Mr. Wisner's cross-examination of Captain Miller and shown to be 26 feet or more above the water (22). The New York was larger than the Conemaugh and of the same style. If her officers were on deck, their line of vision must necessarily have been high above these deck loads.

In a formal brief filed in the District Court soon after the testimony had been taken in open court, counsel for the New York stated as follows :

"The answer admits the failure of the New York to hear the signals of the Conemaugh, or see her lights, and as the Conemaugh clearly proved the blowing of the signals three separate two blasts and the exhibition of proper lights, when she rested her case, we saw no reason for consuming further time by putting in testimony which could only confirm those admissions, and also rested the case of the New York.

This was an admission that the New York's witnesses, who were in court, could offer no exculpatory facts.

We approach the meeting of these vessels with faults virtually conceded on the part of the New York and without an effort on her part to meet the requirements of the law that she must show that these faults did not contribute to the collision. We submit that the New York coming up, with the eyes and ears of her watch closed, is in splendid condition to maneuver so as to thwart any timely measures taken by the Conemaugh. This condition particularly called for the criticism offered by the District Judge, who says, 53 Fed. Rep., 553-555:

"The admitted facts that her officers did not even hear the first two signals of the Conemaugh, and, though their attention was challenged to her by her third whistle, they did not see her until the alarm whistles were sounded, when the vessels were scarcely a quarter of a mile apart, although the weather was favorable to sight and hearing and the conditions of the locality call for careful navigation, are conclusive that her master and lookout, if she had one, were either incompetent or grossly negligent of their duties. If her lookout saw and reported the lights of the Conemaugh, his exoneration makes the conduct of the master or other officer of the deck, in disregarding that warning, more reprehensible. The Conemaugh's whistle was loud

and coarse, and her lights lawfully placed and burning. Nothing can palliate the negligence which failed to notice either. If the master were at his post, or giving attention to his duties, he should have heard or seen the descending steamer, despite the negligence or even the want of a lookout; for the lights were seen and the signals heard by the crews of the Burlington and her barges, and by persons at the coal dock, who were at a greater distance from the Conemaugh than the New York."

The Ottoman, 74 Fed. Rep., 316.

The Oregon, 158 U. S., 186.

III.

The position of the vessels at the time the Conemaugh blew her third signal of two blasts to the New York, and the respective duties of the vessels.

See Diagram No. 5.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED



The testimony as to the position of the boats at the third signal is conclusive and uncontradicted, showing with approximate accuracy the correctness of diagram No. 5.

Capt. Miller, (18):

Q. And at the time of the sounding this third signal of two blasts, what lights did you see on the New York?

A. The same lights.

Q. And three then?

A. Yes, sir.

Court. What lights were you showing him then?

A. The bright light and the green light.

Mr. Goulder. Q. You were then proceeding on what course; how were you heading with reference to the Canadian shore or the trend of the river?

A. A trifle down the stream.

Q. How much down stream would you say your course was taking you then from right square across?

A. Less than 45 degrees, I think.

Q. You may state whether you continued to observe this New York?

A. Yes, sir.

Q. Did you get any answer to your third signal of two blasts?

A. No, sir.

Q. Now, at that time, you may state whether you could or whether you did see this tow, the end of it, the stern barge, and if so, where it was in relation to your vessel and in relation to the Canadian shore?

A. The tail end of the tow at that time was a little forward of our starboard beam and apparently about three lengths of our vessel or thereabouts off from the Canadian shore.

Q. How far did she appear to be below you in the stream, the last barge in that tow?

A. She appeared to be the same distance, about three lengths.

Cross-examination (39):

Q. Where were you when you repeated your signal for the second time, which would be the third signal?

A. Then we were pretty nearly abreast of the tail end of the tow.

Q. Where was the New York?

A. I could see the New York then. He appeared to be in here.

Q. Between the two stern barges?

A. He seemed to be coming in that way. He might have been up in here.

Q. Between the second and third from the end?

A. Yes, sir.

Q. You hadn't crossed his line yet?

A. I had both lights open.

Q. But you hadn't crossed his bow when you blew the third signal to him?

A. No, I think not.

Q. He didn't answer that?

A. No, sir.

Q. He kept coming right along?

A. Yes, sir.

Q. Seemed to be pretty close to the tow, didn't he?

A. He appeared to be.

Q. And his failure to answer your whistle made no difference in the navigation of your boat?

A. It was right about this time somewhere between the third signal and the alarm signal when I sung out hard-a-starboard, steady, then hard-a-starboard.

Q. I am just now navigating with you on the Cone-maugh, having twice had my signals of two signals ignored, blowing a third signal to the New York, at which time you hadn't yet passed the stern barge in tow, and the New York seemed to be between the second and third barges, holding pretty close to them?

A. Yes, sir.

Q. She didn't answer that signal?

A. No, sir.

Q. You didn't change your course then?

A. I think it was about that time we steadied.

Q. About that time you starboarded?

A. I said steadied.

Q. Steadied from a port helm?

A. Yes, sir.

Q. About the time he failed to respond to your third signal you stopped swinging under your port helm?

A. Yes, sir.

Q. He was then showing you both his side lights?

A. Yes, sir.

Q. And you hadn't reached the course of the stern barge?

A. Coming on to it then about that time.

Captain Smith of the Ferguson (98), speaking of the New York:

He came along up till he was abreast of the Republic, which was ahead of the Amaranth, then he was showing the three lights, apparently coming straight for us. I put my wheel hard-a-port, and almost immediately he ported his wheel, or must have, because he had his green light from us.

Q. As the New York was coming at the time, you say, you think you observed her porting, where would she have gone had she held that course and come right along, when you thought you observed her porting, before you lost her green light?

A. She would have come right through the Amaranth or me; struck us.

Q. You may state whether or not that was your judgment at that time?

A. That was my judgment at that time; she was either going to hit the Amaranth or myself.

Q. How far did she clear you?

A. From 50 to 100 feet, I should judge.

Q. At that time, how were you and the Amaranth with reference to each other; for instance, first, how were you heading as to the Amaranth, when that steamer came up by you?

A. We were both heading a little diagonally across the river. Probably swinging from the American (Canadian) side of the river from two points about to starboard.

Q. Do you remember how you were heading as to the Amaranth?

A. We were both heading about the same. I should judge I was astern of her, may be heading on his quarter. It looked as if we were heading about the same.

Hogan, Record (140-141):

Q. At the time when your third signal of two blasts was given you looked out and saw the red light, whereabouts was the New York then? You can give it in distance from your vessel in lengths, or with reference to the tow, if you can tell about the tow?

A. Well, she was somewhere around the third barge.

Q. Somewhere around the third barge?

A. Yes, sir.

The testimony fixing the distance of the tail end of the tow from the Canadian shore, and that showing the courses of the two steamers has already been given. The testimony given in Part 4 hereof also corroborates the positions shown in Diagram 5.

The duties and obligations have not changed from those in the preceding situation, and the argument there made applies with equal force here. It has become a demonstration that the New York could not collide with the Conemaugh if the former kept her proper course with respect to which the Conemaugh had been navigating, going only so far to the eastward as was fairly necessary to clear the tail end of the tow. In this situation the master of the Conemaugh had the right and was in law bound to presume, that the New York, having adopted a course to clear the tow, would continue on that course. If the New York found upon approaching the tow that she had held out false information to the Conemaugh, and that it would be necessary for her to make another change of course to get around the tail end of the tow, it was her duty to check, and if necessary, stop and reverse below, rather than violate her duty to the Conemaugh by making a radical change.

Diagram five gives the situation of the vessels correctly

when the signal was blown. Such position entirely justifies the course and conduct of the Conemaugh up to that time. The vessels are free from risk or danger of collision if they both act within the law and the practice of seamen.

It is indeed the seventh situation pictured by the Supervising Inspectors in the illustration of their rules. A collision cannot occur unless one of the vessels shall port her helm, and the spring-head of the collision which followed was clearly the porting of the New York, the first element of risk in the case.

The answer confesses that the watch of the New York had not seen or heard the Conemaugh. The last barge and the next ahead of her were heading only two points from straight down the river, so that their sailing lights would have notified a vigilant watch of the exact position of these vessels, which it was her duty to avoid.

Further evidence that this collision is primarily due to the conceded poor lookout and reckless navigation of the New York, is found in the manner of her approach toward the end of this tow.

She approached with the purpose of clearing them, and yet on a course not to clear them, but directly onto the two last barges, so close as to cause them to port in fear of being run down. A proper course early adopted would have called for no violent swing, but the New York coming into close proximity to these barges is suddenly called upon for an extreme move and she also evidently hard-a-ports. That she did this is more than probable, since her answer admits that her navigation was solely in respect to the tow, as she had not seen the Conemaugh,

although the latter was giving all legal notice both of her presence and intention.

We ask the court to confirm the conclusion of the District Judge that the self-condemned watch—ignorant through inattention of the very presence of the Conemaugh despite the latter's lights and signals—and therefore *navigating in the supposition that they had the entire space to themselves*, were not careful in porting, but ported too much, and with the aid of the current, sheered over out of her lawful course, and then, realizing the danger, attempted too late to bring their vessel back to her course by a starboard helm. The Conemaugh was notified of the New York's mistake only when it became evident from her movements, under constant and careful observation, when it was too late for the Conemaugh to take action effectual to avoid the collision.

IV.

The movements of the New York and the Conemaugh from the time the third signal was blown by the Conemaugh up to the time of the collision, and the conclusions to be drawn from such movements.

Having the vessels in the third position, as above shown, it would seem but necessary for the determination of this cause, to locate approximately the place where the vessels came into collision, as with the proper course of the New York known and pointed out, it is conclusive that if the collision occurred on that course, the Conemaugh must be condemned. But if the collision occurred out of the proper course of the New York, then, this deaf, dumb and blind New York must be condemned as the injurious vessel.

The testimony as to place of collision fully bears out Judge Swan's finding in that regard.

Miller (19, 186): Was about our length (250 feet) from the Canadian shore when struck.

Hogan (149): The tail end of the tow was 300 feet below us.

Priest (47): Think we were nearly aground when hit.

Capt. Jeans (88): The collision appeared to be close to the Canadian shore.

Capt. Smith of Ferguson (96): I think she was close to the channel bank. (102) The collision occurred up the river and on the channel bank about 1,000 feet from me.

Capt. Smith of the Wesley (125): I should judge the collision occurred pretty near 1,000 feet above the Ferguson. (128) I should think that the collision was about 1,500 feet above the Amaranth.

Merrill, wheelsman on Ferguson (130): Collision occurred about four lengths of the Conemaugh from us. (133) On the Canadian side.

Davidson, wheelsman on Wesley (135): The collision occurred about 800 feet or so above the Ferguson.

Powrie, master of Burlington (63): Collision appeared to be close to the Canadian shore.

Jordan, mate of Burlington (83): Continued to watch the New York until she passed up stream clear of the Ferguson, and then went to getting lines out. Did not see collision.

Hogan, second mate (152): We were 300 feet above the Ferguson when struck, and she was way out in the river. I do not mean that collision occurred only 300 feet from Ferguson.

Dawson, from coal dock (163): Collision appeared to be 500 or 750 feet above Ferguson.

Linderman (171): Collision about 500 feet above Ferguson.

With the Ferguson 800 or 900 feet from the Canadian shore, and so at least 600 feet out in the stream from the channel bank, and the collision occurring at or on that bank and some 300 to 1,000 feet further up the river than the

Ferguson, and at least a thousand feet from her in a straight line, it seems ~~that~~ more conclusive proof of the continued unnecessary deviation from her course on the part of the New York would be impossible.

We charge that the New York in this case must clearly be condemned for the following reasons:

1. In not keeping proper lookout.
2. In being in charge of incompetent officers.

The admissions of the answer and of counsel, we contend, prove these allegations. Further, the burden being upon the New York to show these faults did not contribute to the collision, she has made no endeavor to meet it. On the contrary, it is inferable, if not apparent and certain, that because of inattention to duties or lack of proper officers on deck, is due the peculiar position in which the New York placed herself with respect to the tow, and which called upon her to make a violent change to clear. Furthermore, when making this change they did not see the Conemaugh, and, therefore, it would seem to follow that no precaution had been taken on the New York to avoid a departure from their course more than was made necessary by the tow, since at that time they did not know that the Conemaugh was navigating with respect to them. *Confessedly owing a plain legal duty to the Conemaugh, and confessedly not knowing anything about the situation*, the case justifies the stricture of the District Judge that,

"The faults of the New York are so many and flagrant that it may be doubted if judicial records afford a parallel to the negligence and recklessness of their navigation."

3. We charge that, having adopted a course close to the tail end of these barges, she was at fault for changing

it when close to them, rather than checking her speed or stopping if she found it necessary or advisable not to proceed on this course with respect to which the Conemaugh had a right to navigate. This proposition we have heretofore argued we think at sufficient length. That a violent change of course was here made is conclusively shown; also the movements of the vessels from the blowing of the third signal up to the time of collision, by the following testimony:

Captain Miller, cross-ex. (18).

Q. How much down stream would you say your course was taking you then from right square across?

A. Less than 45 degrees, I think.

Q. You may state whether you continued to observe this New York?

A. Yes, sir.

Q. Did you get any answer to your third signal of two blasts?

A. No, sir.

Q. Now, at that time, you may state whether you could or whether you did see this tow, the end of it, the stern barge, and if so, where it was in relation to your vessel and in relation to the Canadian shore?

A. The tail end of the tow at that time was a little forward of our starboard beam and apparently about three lengths of our vessel or thereabouts off from the Canadian shore.

Q. How far did she appear to be below you in the stream, the last barge in that tow?

A. She appeared to be the same distance, about three lengths.

Q. To that third signal did you get no answer?

A. No, sir.

Q. Will you give the movements of the vessel from that time until you came into collision?

A. Right after that I lost the green light, then sounded an alarm whistle of several short blasts, ordered my helm

put hard-a-starboard, and he came right along and hit us abreast of our foremast, on our starboard bow.

Q. At the time you sounded the danger signal on losing his green light, whereabouts was the New York with reference to the tail end of the tow?

A. He was somewhere about abreast or between the two last barges.

Q. Somewhere in that vicinity?

A. Yes, sir.

Q. As that vessel approached at the time of your losing the green light and from that time on, how did she appear to you to come up the river as to whether she came directly or was swinging either way?

A. *I didn't notice the lights after that, not after sounding the alarm whistle.*

Q. What, if any, indication in that regard did you get from what you could see of the boat herself?

A. Well, at the time he shut out his green light I was under the impression he was swinging on the port helm.

Q. And that indicated that he was, didn't it?

A. Yes, sir, and the manner in which he struck us, he must have been coming on the starboard helm.

Q. Can you tell the court how far you were from the channel bank when you struck?

A. We were about our length, probably a little more.

Q. From the Canadian channel bank?

A. Yes, sir. (At page 186 the witness states that in giving the above distance he meant, not from the channel bank, but from the Canadian shore line.)

(40-41):

Q. About the time he failed to respond to your third signal, you stopped swinging under your port helm?

A. Yes, sir.

Q. He was then showing you both his side lights?

A. Yes, sir.

Q. And you hadn't reached the course of the stern barge?

A. Coming on to it then about that time.

Q. Now, captain, if you hadn't steadied from the port helm you think you would have swung down on the port side of the New York?

A. Yes, sir. (Answer was "no, sir," as shown by next question and answer.)

Q. Then your steadying from a port helm there did not make any difference with the collision?

A. No, sir.

Q. Did you steady?

A. Yes, sir.

Q. Did your vessel stop her swing?

A. I believe so.

Q. And then you blew him a fourth signal of two whistles?

A. No, sir, that was an alarm whistle, several short blasts.

Q. You only blew him three signals of two whistles then?

A. That was all.

Q. The last one was blown just about as you were entering on the stern of the rear barge, and as you passed the stern of the rear barge that I understand you to say, that the green light of the New York disappeared, shut out?

A. Somewhere between the third and the alarm whistle, yes, sir.

Q. Somewhere between the third whistle and the alarm, and before or after you steadied?

A. I think it was right after. I am not positive, but I think it was right after.

Q. What induced you to steady?

A. Because I was not opening his lights quite as quick as I ought to, and losing this light led me to believe they were altering their course.

Q. Did it occur to you that perhaps you were swinging away from that light?

No answer.

Q. *You thought he had ported?*

A. *I thought he had.*

Q. And you thought so because you lost the green light?

A. Yes, sir.

Q. Did you ever have it open bright at all?

A. Quite full.

Q. You had it simply around outside rays of light?

A. I got the edge of the light, at the time I blew the third whistle, the light itself.

Q. And when the light shut out you blew the alarm?

A. Yes, sir.

Q. And you blew the alarm as you came by the stern barge?

A. Yes, sir, I was by the stern barge then, I think.

* * *

Q. When you blew the alarm and pulled out by the stern of the rear barge, you saw the New York coming into you?

A. After I sounded the alarm, yes, sir. It was after that.

Q. Where were you when you sounded the alarm?

A. I had passed the stern barge.

Q. You were by it then?

A. Yes, sir, and then swinging on the starboard helm.

At first (least) the helm was put starboard, being under check she might not have got much way.

* * *

Q. Why did you starboard?

A. Because I had lost the light.

Q. You lost it when you steadied?

A. It was about that time.

Q. When you came out there and blew your alarm, you saw the New York coming right after you, didn't you?

A. I saw her coming pretty fast.

Q. Right into you?

A. He appeared to be so, sir.

Q. At what angle did he strike you?

A. I should think it was something greater than 45 degrees; that is, from the line of our keel (placing models).

Q. You think about four points off your bow?

A. Something like that, and it struck just abaft of the place where I was standing. Our bridge is well forward. It fetched us somewhere in about there. (Indicating models.)

Q. Why did you starboard your helm the last time?

A. I tried to get over as far as I could out of his road, to give him all the room possible.

* * *

Re-direct by Mr. Goulder :

Q. I will just complete Mr. Wisner's line of examination by asking you to state why you didn't reverse?

A. After (I) he had signalled?

Q. *Yes, sir, in that situation tell the court what your judgment about it was, and why you didn't reverse?*

A. *I had signified to this steamer the course I was taking. Had I stopped here and he had seen fit to answer my whistle, I would have been in his road. I was coming with our current at that time, drifting with the current.*

Priest, lookout (46):

Q. I will state here, to get it into the record, that the name of the last barge in the tow was the Ferguson, and that the name of the next in front of her, the third tow barge, was the Amaranth. Now, from the place you saw the New York, at that time, how did she, to your eyes, seem to approach your vessel, as to whether she came straight or whether she wobbled?

A. She seemed to me to be altering her helm.

Q. How did she go?

A. Her port helm seemed to run right in the Canadian shore.

Q. When she struck you how did she seem to be coming?

A. Straight into us. I saw both her lights then.

Q. And how close in to the shore did it seem to you your boat had got at the time you were hit?

A. Oh, I should think we were nearly aground, according to my idea.

Q. Did you notice when you touched the ground?

A. No, sir, I cannot say I did notice it.

Cross-examination (57-58):

Q. She seemed to be swinging around pretty lively, did she?

A. Pretty quick.

Q. And she shut out her green light entirely and showed you a bright red light?

A. Yes, sir.

Q. And that continued until she had arrived at what part of the tow?

A. Well, I should say it was the tail end of the tow, after she passed the tow altogether.

Q. After she passed altogether?

A. Yes, sir.

Q. When the Conemaugh came by the stern of the rear barge and the New York came by the stern of the barge, she was showing you her red light alone?

A. Yes, sir.

Q. You could see her then?

A. I could see the back of her.

Q. And the barges were out of your way?

A. Yes, sir, they were dropping down all the time, and we were dropping down the same time, too.

Q. After you passed the rear of the stern barge, and had open water all around your starboard bow, the only thing in the way was the New York, and she was showing you her masthead light and red light?

A. Yes, sir.

Q. And she seemed to starboard and run into you?

A. Yes, sir.

Q. Now, Mr. Priest, are you satisfied with that statement as correct?

A. Yes, sir.

Cross-examination, (59-60):

Q. She came up continuing to show you that red light until you reached up astern, or until this barge got down by her when she showed both lights?

A. Yes, sir, and struck us at the same time she showed us the both lights.

Q. When she was showing you the red light you think the relative bearing of the boat was about that way? (Placing models.) Your boat was running ahead?

A. Very slowly.

Q. And ran across her course, did it, before you two came together?

A. Yes, sir.

Q. Did she seem to be going around pretty lively?

A. Yes, sir.

Q. Could you see anything on the shore at the time of the collision?

A. No, sir, could see black outlines of the trees, no lights or anything.

Q. What order to the wheelmen did you hear after the last blast of two whistles?

A. Hard-a-starboard.

Q. When was that given?

A. After we blew two whistles; after we blew the last two whistles.

Q. How, with reference to the alarm whistle, before or after that was blown?

A. After the alarm was blown.

Q. Did you stand on the deck all the time until the collision took place?

A. I stood there all the time until she hit us.

Q. What did you do when she hit you?

A. Waited until I was told to go away.

Q. Did you know when she took the bottom?

A. Yes, sir; she took to bottom just after we were struck.

Q. About the same time?

A. About a minute or so.

Q. Pretty near the bank when you struck?

A. Yes, sir, as far as I can judge.

Q. As it seemed to you the boat was pretty near the bank when they came together?

A. Yes, sir.

Q. And the Conemaugh's nose ran in the bank very soon after she was struck?

A. Yes, sir.

Jordan, mate of Burlington, did not see collision. (83):

Q. How long did you continue to watch the New York?

A. I watched her until she passed the last barge, then I went over and got my lines out; we were then pretty close to the dock.

Capt. Jeans, of Amaranth, cross-examination. (88-89).
By Mr. Kremer:

Q. Did I understand you to say that the collision occurred close to the Canadian shore?

A. I think so.

Q. Did you hear the crash of the collision ?

A. Yes, sir.

Q. Were you looking that way at the time ?

A. Yes, sir.

Q. And which side of the Conemaugh was struck ?

A. I think she was struck on the starboard bow, if I ain't mistaken.

Q. And where was the last barge at that time ?

A. The last barge was right astern of me.

Q. Where was the last barge with reference to the collision ?

A. That I don't know; she was coming down the river following me, coming around. She was following my light, I presume.

Q. You were out in the river ?

A. Yes, sir, pretty well across by that time.

Q. And the other barge, had she turned at the time of the collision ?

A. She had begun to turn.

Q. Did the collision occur abreast of the last barge, or just astern of her ?

A. A little astern of her, I would judge.

* * *

Q. When you first saw the Conemaugh, the New York was showing you her red light ?

A. Both of them, red and green light and masthead light.

Q. Before the Conemaugh turned, the New York had also ported, had she not ?

A. A little.

Q. So she was showing her red light ?

A. Yes, sir, showing her red light to keep clear of me.

Q. You saw the New York port and then saw the Conemaugh starboard ?

A. Yes, sir. Well, I was not close ; they were both going over towards Canada.

Re-direct examination by Mr. Goulder (94) :

Q. The New York, you think, when she passed your barge, was headed as much towards the Canadian shore as is indicated in this picture, "New York 3?"

A. I think so, as near as I can tell. Of course, it was pretty dark.

Q. And she kept going over in that way, as you say, until she hit the Conemaugh which was up the river?

A. Yes, sir.

Q. And what, captain, with your vessels in that shape, and the vessel passing you, I think you said within 75 or 100 feet, what was there to prevent the New York from starboarding and coming out alongside of the Ferguson and going up the river?

Mr. Wisner: I shall object to that as not material, because the New York's duty was defined by law, and whether she might have done something else or not in the way of changing her course makes no difference, as she was under no obligation to do so. It would be only putting in the record here something that has no bearing on the case.

Court: You may ask the question.

Q. The New York having come up here, so as to look clear of you, as you say, by closing her green light, what was there to prevent her starboarding in time and coming up here around the Ferguson and out in the river again?

A. That would be a hard matter for me to tell on account I was not aboard of that steamboat, but I should think they had all the chance in the world to do so.

Q. That was your judgment standing there that night?

A. That was my judgment. My judgment is not another man's judgment.

Captain Smith, of the Ferguson, (96), examined by Mr. Goulder:

Q. When the New York passed you, and also at the time of the collision between the Conemaugh and the New York, how far in your best judgment do you place your boat off the Canadian shore, what part of the river?

A. I was about one-third of the river from the Canadian shore out.

Q. How far above your vessel do you say that collision occurred?

A. The best of my judgment between three and four lengths of the Conemaugh, somewhere about that; about a thousand feet.

Q. Where did it occur with reference to the Canadian side of the river?

A. It was close on the channel bank. I think the Conemaugh was in the mud. I don't know.

Q. You think the Conemaugh was already in the mud at the time of the collision?

A. Yes, sir, I thought so.

Q. Where was the Burlington with reference to your vessel at the time of the collision?

A. She was at Smith's coal dock and a little up the river from me, if anything.

Q. A little up the river and opposite of you?

A. Yes, sir.

Q. And that distance that she was up, are you able to give it, or didn't you notice it carefully enough?

A. Not definitely, no. She might have been about half a length of the dock, I could not tell from that distance.

Q. She might have been a half a length of the dock further above you in the river?

A. Yes, sir.

Q. And to the other side?

A. Yes, sir, I was just about abreast of the lower lights on the dock.

(98):

He came along up till he was abreast of the Republic, which was ahead of the Amaranth, then he was showing the three lights, apparently coming straight for us. I put my wheel hard-a-port, and almost immediately he ported his wheel, or must have, because he had the green light from us.

Q. As the New York was coming at the time you say you think you observed her porting, where would she have gone had she held that course and come right along, when you thought you observed her porting, before you lost her green light?

A. She would have come right through the Amaranth or me; struck us.

Q. You may state whether or not that was your judgment at that time?

A. That was my judgment at that time; she was either going to hit the Amaranth or myself.

Q. How far did she clear you?

A. From 50 to 100 feet, I should judge.

Q. At that time how were you and the Amaranth with reference to each other ; for instance, first, how were you heading as to the Amaranth, when that steamer came up by you ?

A. We were both heading a little diagonally across the river. Probably swinging from the American (Canadian) side of the river from two points about to starboard.

Q. Do you remember how you were heading as to the Amaranth ?

A. We were both heading about the same. I should judge I was astern of her, maybe heading on his quarter. It looked as if we were heading about the same.

Q. And as to the Ferguson and Republic at that time, if there was any difference at all, which of you was over further towards the Canadian shore ?

A. I don't think there was any difference.

Q. When the New York came by you, which way was she heading ; whether directly up or towards the American, or towards the Canadian side ?

A. She appeared to me to be heading a little towards the Canadian side.

Q. Did you observe her as she went up there from that point up to the collision ?

A. Yes, sir.

Q. Did you look out then and see both of them ?

A. Yes, sir.

Q. Can you tell the court anything about the course of the New York after she passed you, whether she wavered to one side or the other ?

A. No, sir, I cannot tell you whether she swung one way or the other.

Q. Now, Captain Smith, what do you think about the speed of the New York ?

A. She was coming very fast, probably ten miles an hour.

Q. Was that boat going up there under a checked speed of four miles an hour ?

A. No, sir, she was not; if she was, it was a very fast four miles.

Q. Now, captain, suppose that the New York, when

she passed you, was under a starboard helm, and as she passed you started to swing to port, where would she have gone with reference to the Conemaugh as you saw the situation?

A. It seems to me she would have went clear of her.
Cross-examination, (101):

Q. How do you arrive at the distance that you say you were from that bank when you say you were one-third of the distance over?

A. By looking at one side and the other side, and seeing that it was twice as far one way as the other.

Q. You had no difficulty in arriving at that?

A. No.

Q. And yet you are absolutely unable to tell me the number of feet you were away from that dock?

A. Certainly I am.

Q. How do you happen to know, if you cannot tell that, that this collision occurred about a thousand feet from you?

A. I judged that from the distance, and the time we run down there.

Q. You saw what was going on, didn't you?

A. I saw the two boats would come together.

Q. And you saw also the water that there was between where you were and the collision?

A. Yes, sir.

Q. And you judged that distance to be a thousand feet?

A. Yes, sir.

(102):

Q. Did the collision occur abreast of the Ferguson?

A. No, sir.

Q. About what direction from the Ferguson did it occur?

A. It was up the river some place.

Q. Off your port quarter?

A. Yes, sir. She was to the port side of the river, further up the river than I was.

Q. And the New York had passed you within fifty feet?

A. Within 50 or 100 feet, I cannot say exactly.

Q. Did you say the collision occurred off your port quarter up the river?

A. It was on the port side of me and up the river.

Q. Was it directly astern of you, or on your port quarter, or abeam of you?

A. It was on my port quarter and astern.

Q. How many points do you think?

A. It bore off between two and three points.

Q. And you say the Conemaugh was virtually on the bank when she struck?

A. I think so; I don't know for a certainty.

Q. From what you saw?

A. That is my opinion of it.

Q. How close did the New York pass the Amaranth?

A. She passed her fully as far from her as she was from me—50 or 100 feet.

Q. She passed you what you would call close, didn't she?

A. Well, you would call 50 feet close with a big boat like that, and us little fellows.

Q. When the Conemaugh was blowing her whistles to the New York she was on your starboard hand astern, wasn't she?

A. Yes, sir.

Q. And when she blew the alarm whistles she had got under your stern?

A. *She was directly astern of me.*

Q. And the collision occurred immediately after that?

A. Shortly after that.

(103):

Q. Do you know whether the New York made any change in her course after she passed the Ferguson, or as she was passing the Ferguson?

A. No, sir.

(104):

Q. As I understand you, it wasn't until she blew the alarm whistles that she got from under your stern?

A. She was passing across my stern.

Q. At the time she blew the alarm whistles?

A. Yes, sir, up the river and astern of me.

Q. About how far was she astern of you?

A. She was about three or four lengths of herself, I should judge.

Q. How fast were you moving at that time?

A. We were moving a little better than two miles an hour. We were with the current, probably a little better than the current.

(105):

Q. Was the Amaranth nearer the Canadian bank as she rounded there than you were?

A. I would not say to that. I don't think she was. If she was it was a very trifle.

Q. As I understand you, the New York passed you when you were about two points off the course up and down the river?

A. Yes, sir.

(107):

Q. What interval was there, if any, between the last two blasts of the Conemaugh and the alarm whistles?

A. Very short.

Q. Can you give us any idea in seconds how long it was?

A. No, sir, I would not pretend to.

Q. Was the interval as short as was the interval between the alarm whistles and the collision?

A. Yes, sir, I would think it was; I would not be positive.

Q. And the collision followed almost immediately on the alarm whistle, didn't it?

A. Very shortly afterwards.

Q. So that the two blasts of the whistle, then almost immediately the alarm, and then almost immediately the collision?

A. A very short space of time.

Q. The time between the last two blasts of the Conemaugh and the collision was a short time?

A. Yes, sir.

Q. So short that there wasn't time to do anything to avoid the collision?

A. I would not say that ; you can do a good deal in a short space of time sometimes.

Q. If there was time enough to avoid a collision, what do you think there was time enough to do to avoid it?

A. I could not say. I should think a man had time enough to roll his wheel over anyway.

Q. That is from the time the last two blasts were blown until the collision occurred?

A. Yes, sir, he would have lots of time to do that.

Q. He would have time enough to put his wheel hard-a-starboard?

A. Yes, sir, either way; a little more than enough to do that, I should judge.

(108):

Q. Did you think there was time enough to get a wheel over?

A. Any ordinary wheel there was, and more time. I could put my wheel over three or four times.

Q. Then yours is an extraordinary wheel?

A. Yes, sir, it is an extraordinary easy wheel to put over.

Q. About how far do you think you moved from the time the last three blasts were given until the collision occurred, how many lengths of your vessel?

A. Oh, I might have moved one length, and I might have moved three, I don't know.

Re-direct examination, Mr. Goulder, (109):

Q. The New York, before you lost her green light there, in the neighborhood of the Amaranth, was showing you, you have stated, all three of her lights?

A. Yes, sir.

Q. And had been showing them for how long a time?

A. It was a short space of time. I would not say exactly. I would not put it into minutes.

Q. And how far in your best judgment was she short of hitting the Amaranth, when you lost her green light?

A. From where I stood it looked to me she was 50 or 60 feet from her.

Q. And went past her that far?

A. Yes, sir.

Q. Now, what was it in your judgment, at the time, which made the New York miss the Amaranth for which you say she had been heading?

A. I thought he ported his wheel.

Q. The New York?

A. Yes, sir.

Q. And if he had not ported his wheel, what would he have done?

A. I thought he would have struck either one or the other of us.

Captain Smith, recalled by Mr. Goulder (182-183):

Q. At the close of your testimony there was said by way of question and answer, about your porting on the Ferguson, and the effect or possible effect of that as to shutting out the green light of the approaching propeller New York, do you remember that subject of your testimony?

A. Yes, sir.

Q. I want you, if you will, to explain to the court, your vessel lying in the position she did under those circumstances, the effect of your putting your helm aport?

Objected to. He said it would swing her bow.

Objection overruled.

Q. What would the effect be as to your stern?

A. Excuse me, if I said her bow, I didn't mean that. It would slew her stern, it would not change the position of her bow.

Q. But changes the direction of the heading of the boat by swinging the stern?

A. Yes, sir.

Q. On this occasion then, as the propeller approached you, describe what the effect of putting your helm aport was, as you testified you did?

A. It would have the effect of throwing me, myself, in view of the green light of the New York, more than I was, if anything.

Q. You were standing where on your boat?

A. I was standing just forward of the cabin on top of the deck load.

Q. You were there in that position when the New York, in the place you described, closed out her green light?

A. Yes, sir.

Cross-examination :

Q. What was your speed?

A. A very little faster than the current, a little over two miles an hour.

Q. What is the current there?

A. About two miles.

Q. What was your speed then?

A. A trifle over two miles.

Q. How much over a trifle?

A. I could not say at all.

Q. You could not say at all?

A. How much over the current?

Q. Yes?

A. No, sir, I can't.

Q. You don't know whether this speed of your's was greater than the current?

A. A trifle.

Q. A half a mile?

A. I don't think so.

Q. Over a quarter of a mile?

A. Between that and nothing.

Kelley, wheelsman, (112-113):

Q. Did you look down that way, and did you see the New York or her lights when your second signal was blown?

A. No, sir, I didn't look down that way at all. The first I saw of the New York was after the alarm signal and we put the wheel hard-a-starboard. After we got the wheel over, I looked down and I saw the New York coming.

Q. When you did that, give us your best judgment of how far the New York was away from you then.

A. Well, she looked to be about two or three boat lengths.

Q. Did you notice anything about her lights?

A. Of course I noticed her lights; I thought she was coming on a steady gait; I kept my eyes on her and shortly after she began swinging to port, and I heard aboard the New York, I heard them hollering, "hard-a-starboard."

Q. How long did it take you that night, when you got that last order hard-a-starboard, to get your wheel over, in your best judgment?

A. Oh, somewhere about 10 or 15 seconds, I should say.

Q. Did any one help you put it over?

A. The second mate.

Q. Which side of the wheel were you standing on?

A. I was standing on the port side.

Q. When you looked down and saw the New York after you had got your wheel hard-a-starboard the last time, did you notice anything of a barge near your boat?

A. No, I didn't notice that at all.

Q. Did you see any such thing as that between you and the New York, or closer to you than the New York?

A. No, I didn't notice the barge at all.

Q. You saw nothing of that kind there?

A. No, sir.

Q. And I understand you to say, correct me if I am wrong, that you had not before noticed the barges, or paid any attention to them?

A. No, I didn't pay any attention to them at all.

Q. Where was the captain during all this time?

A. He was right in front of the pilot house, on the bridge.

Cross-examination (117), (speaking of the Conemaugh):

Q. After you had the order to hard-a-starboard until she was struck, how far did she run?

A. I would not say that at all.

Q. Would she run a length?

A. I don't know; I would not say.

Q. Well, about how far; two or three lengths?

A. Oh, no, nothing like that.

Q. Not two or three lengths?

A. I don't think so, no.

Q. Would she run a length?

A. Well, I would not say how far she would run, but I know she would not run two or three lengths.

Captain Smith, of Wesley (125):

Q. How far above the stern barge in your tow, the Ferguson, did the collision appear to you to take place?

A. Well, I should think it must have been pretty near a thousand feet; the way it looked to me from where I

was. Of course I didn't measure it, but that is what I should judge.

Cross-examination, (128):

Q. How far did it (the collision) occur from where the Amaranth was?

A. Well, it must have been quite a ways from where the Amaranth was I should think.

Q. You could not tell that, either?

A. Not exactly; It was somewheres around 1,500 feet, the way it looked to me.

Merrill, at wheel of Ferguson, (130-131):

Q. How near did the Conemaugh come to your stern at any time?

A. Well, the closest she was, I think, was about four lengths of herself.

Q. How far, Mr. Merrill, in your judgment, if you have formed any judgment on it, was the point of the collision from your boat?

A. About four lengths of herself.

Q. When did you first see the New York?

A. When she was right off our quarter.

Q. Did the deckload prevent you from looking down the river?

A. Yes, sir.

Q. Did you notice how fast the New York was going, or how fast did she appear to be going when you first saw her?

A. I don't know how fast exactly, but she was going at a pretty good rate.

Q. About how fast, can you give us any idea?

A. I don't know as I can tell.

Q. Was she going faster or slower than the Conemaugh was?

A. She was going faster.

Q. How much faster do you think?

A. About twice as fast I should judge.

Q. How was she heading when she came up on your quarter and you saw her first?

A. She was heading right off towards the Canadian shore.

Q. How near, if you noticed, were the two boats to the Canadian shore when they came together. That is, the Conemaugh and the New York?

A. Well, I don't know how near they were, I was paying particular notice of our own boat about that time.

Cross-examination by Mr. Kremer :

Q. The New York passed you close by?

A. Yes, sir.

Q. Within fifty feet?

A. Somewheres around there.

Q. What you call close?

A. Yes, sir.

Q. And you saw her plainly as she passed you?

A. Yes, sir.

Q. At that time you were heading straight up and down the river, or across the river?

A. We started to swing then. I had orders to put the wheel aport.

Q. Had she got abreast of you when you got the order to hard-a-port?

A. No, I got the order before I seen the New York.

Q. The deckload was higher than your boat, wasn't it?

A. Yes, sir.

Q. And you could not see the New York until you could see her from your port quarter?

A. Yes, sir.

Q. Had she lapped the Ferguson when you saw her the first time, had she come abreast of the Ferguson?

A. Yes, sir.

Q. Was the Conemaugh following you any?

A. I think she was, yes, sir.

Q. Following you?

A. Yes, sir.

Q. She didn't get out on your port side until after you saw the New York, did she?

A. I think she was towards the bank about that time I saw the New York.

Q. Was she heading on to the bank?

A. Yes, sir.

Q. Was she heading right straight on the bank?

A. No, she was slanting kind of down.

Q. Was she slanting more on the bank than the New York was?

A. I don't know, they were both heading on the bank.

Q. Can you tell which one was most headed on the bank?

A. I think the New York was most heading on the bank, because I think the Conemaugh was closer to the bank.

By the court (133):

Q. Did you see the collision?

A. Yes, sir.

Q. How far did it occur from the Ferguson?

A. I don't know exactly how far, three or four or five lengths of our boat, I should think.

Q. Which way from you?

A. Right off our stern.

Q. On either side?

A. On the Canadian side.

By Mr. Kremer:

Q. Was it abreast of the Ferguson or over her quarter or over her stern?

A. Over her stern.

Q. Was it directly astern of her, or to one side?

A. I should think it was a little on the Canada side.

Davidson at the wheel of the Wesley, (135):

Q. From where your boat was, looking across the river, will you state whether the tail end of the tow was above or below you at the time of the collision?

A. Above us.

Q. Where was the collision?

A. In regard to the Ferguson?

Q. Yes.

A. She was astern of the Ferguson. The collision was astern of the Ferguson.

Q. About how far do you think?

A. I could not state exactly; the best of my judgment it would be about 800 feet or so.

Hogan, (140-141) :

Q. At the time, when your third signal of two blasts was given you looked out and saw the red light, whereabouts was the New York then? You can give it in distance from your vessel in lengths, or with reference to the tow, if you can tell about the tow?

A. Well, she was somewhere around the third barge.

Q. Somewhere around the third barge?

A. Yes, sir.

Q. At the time of the danger signal were you looking down that way?

A. Yes, sir.

Q. Whereabouts was the New York then?

A. Well, she was coming up on the last one; somewhere abreast of the last barge.

Q. How far below you in the river was the tail of that tow in your best judgment?

A. Oh, she was probably a boat length or a boat and a half; probably 300 feet.

Q. Did you get your helm hard over, hard-a-starboard?

A. Yes, sir.

Q. Did you look out after you had got it hard over?

A. Yes, sir.

Q. And where was the New York then?

A. Well, she was down the river a little ways from us.

Q. How much, what is your impression about it?

A. I guess about a couple of boat lengths.

Q. At the time you looked out, after your helm was hard-a-starboarded, at the time we are talking about, did you notice her colored lights at all?

A. Yes, sir, I saw her red light.

Q. Did you notice any time after that and before she struck you, anything about her colored lights?

A. Well, before she struck us I saw both the lights; she seemed to be coming around on a starboard wheel; I could see both lights just before she struck us.

Q. How much would you say your vessel swung under that final hard-a-starboarding?

A. Probably a point and a half or two points, probably somewhere about that.

(142) :

Q. When the New York struck you, have you any idea how far you were from the bank ?

A. Well, we were not very far. I don't know. I expected to fetch up on the bank before she struck us.

Q. What do you say about whether she did fetch up on the bank before you were struck ?

A. I don't think she did.

Q. How near did you get to it ?

A. Well, we were not over half the length of ourselves away from the bank.

Cross-examination (148-149) :

Q. When you blew the alarm, then you had cut the course of the tail end of the tow and could look down the port side ?

A. Yes, sir.

Q. You saw the red light of the New York ?

A. Yes, sir.

Q. And you could see the distance between the New York and the tail end of the tow ?

A. Oh, I could see they were pretty well off, but I could not make out the distance. At the time of the alarm she was coming probably by the stern barge somewhere.

Q. At the time the alarm was blown the Conemaugh had passed the line of the rear barge's course, and the New York was about abreast of the stern barge ?

A. Yes, sir.

Q. You blew the alarm and put your helm hard-a-starboard ?

A. Yes, sir.

Q. And you swung about a point and a half, you think, before she struck ?

A. Didn't swing as much as that.

Q. How much did you swing ?

A. (Placing models.) That is the position she was in when she struck.

Q. You didn't strike—you didn't swing at all under that hard-a-starboard, did you ?

A. Yes, sir, she swung some.

Q. A point ?

A. Probably that.

Q. About a point?

A. Yes, sir, from that to a point and a half.

Q. She didn't swing six points?

A. No, sir, she didn't swing any more than a point and a half, somewheres in that neighborhood.

Q. And that is the relative position of the boats when they came together, in your judgment?

A. Yes, sir.

Q. She struck right abreast of the barge?

A. Yes, sir, something like that.

Q. She struck you at an angle of seven points, you think, seven points on the starboard bow?

A. Yes, sir, pretty near, call it that.

Q. Did you remain in the pilot-house until she struck you?

A. Yes, sir.

Re-direct examination, (149-150):

Q. When the New York came around the stern of the last barge, if she had had her helm starboard then, and came around there on a swing to starboard, where would she have gone?

A. If she had come around the stern barge she would have went clear, certainly. There was lots of room to go clear, but she didn't appear to come around that way; she went around over toward the Canada shore.

Q. My question is, suppose that after passing the stern barge she had not first gone over towards the Canadian shore and then turned, but had turned up here by the barge, then where would she have gone?

A. She would have went clear then.

Q. And you would have passed each other how?

A. Starboard to.

Q. And you say there was plenty of room for that to have been done if she had turned at that point?

A. I think so.

Q. How far, can you give us any idea, below the tow did the New York turn from the position in which she was showing you both of her lights to this course she took over here which brought her to the Canadian shore under your bow? How far below when she made that change, shut out

her green light from you and took this course that brought her over into the Canadian shore?

A. She appeared to be very close, I could not say just how much.

Q. To which barge? Heading apparently—before he made that change, heading apparently for what barge?

A. Heading on the third barge in the tow.

Q. That is the one we have called the Amaranth here.

A. Yes, sir.

Q. You said you were unable to tell just what the distance was between the New York and the last barge in the tow when she came past her?

A. He appeared to be very close there when he was passing.

Q. Could you see down between them, between the New York and that barge as she came along there?

A. No, sir, I could not, because they were heading in such a direction; I could not see from where I was.

Q. What do you say about the room here between the last barge in the tow and the Canadian shore, as to whether there was room for those boats to navigate, if they had been properly handled?

A. I certainly think there was room enough for them to pass.

Q. And about the room that was between you as you came along here and this stern barge, what do you say about there being room there for a propeller to navigate in safety between you and that barge?

A. Yes, sir, there was. The barge was pretty well off us.

Q. To your starboard?

A. Yes, sir.

(151):

A. There was room enough to come around. They could have come around between us and that second schooner. I think there was plenty of room.

Q. Then why didn't she go clear?

A. Because he didn't come around in time enough.

Q. Because the New York didn't come around in time enough?

A. Yes, sir.

Cross-examination, (152-153):

Q. Now, you say to Mr. Goulder there was room enough between the tail end barge of that tow and the New York, when the New York came by her, for the New York to have starboarded and run in close under her stern, closer than she did? You stated that, did you?

A. Yes, sir.

Q. How far from that barge, in your judgment, did the New York pass?

A. Passed up around the stern, or do you mean when she was going across the river?

Q. Passed around the stern.

A. Well, she passed from three to four boat lengths of the Conemaugh, that is, after she came up the river.

Q. Just think of that again and tell me once more how far the New York passed from that stern barge?

A. Just after she comes around there a little?

Q. (Placing models.) The stern barge is in its proper place. Tell me how far she passed, please, from that stern barge? You may take the model and place it wherever your good judgment thinks it was. The stern barge was heading down stream, wasn't she?

A. Well, she was heading more over.

Q. We will make her head more over then. Make her head any way you like. Now, show us how the New York came up?

A. She came up in that direction. (Moving models).

Q. Now, right there, how far was she in your judgment from that stern barge?

A. Well, she could not have been more than 100 or 200 feet anyway. Somewhere in that vicinity. She was very close.

Q. She was very close to that rear barge?

A. Yes, sir.

Q. Now, you say she could have sooner have starboarded and run under the stern of that barge and cleared the Conemaugh. What do you mean by that?

A. I don't think she got her wheel over hard-a-starboard when she did come around.

Q. Where do you think she ought to have put her wheel over?

A. When she came to his quarter she could have come around that way, under the starboard wheel.

Q. He could have starboarded or started his starboard helm when on the quarter or beam or abreast of that stern barge?

A. When he was on the quarter.

Q. And that would have given her a swing to port around the stern of the barge?

A. Yes, sir.

Q. Now, she was on a swing to port when she struck you?

A. Yes, sir.

Q. And she struck you about 300 feet above that stern barge?

A. Above, yes, but this stern barge was away out in the river.

Q. The stern barge was away out in the river?

A. Yes, sir, we were in here, nearer the shore.

Q. Can you get the boats in that position without putting the helm of the New York hard-a-port and swinging her around over and then putting it hard-a-starboard and swinging back again?

A. No.

Q. Where were the boats when they came together, I mean the Conemaugh and the New York. Where were they with reference to these boats now?

A. (Placing models.) In that position.

Q. Now, the distance between the stern of the New York and the last barge of the tow is less than 100 feet, you say, the lateral distance?

A. I am a little mixed on these boats. The New York was above the tow.

Q. Do you think you have reached it now as you want it?

A. Yes, sir.

Q. And the distance from the collision to the (stern) steam-barge of that tow is about 300 feet, as you say, or you have said it two or three times?

A. What I said was that we were 300 feet above, not right above, up this way.

Q. When the collision took place?

A. I mean to say this boat was out in the river, she left a good space to go up here, but she was out from the bank here. That was the 300 feet I had reference to. It was the 300 feet we were above the tow, about.

Q. The Conemaugh was 300 feet above the tow when the New York struck her?

A. Yes, sir, above, but not in distance.

Q. And the New York came up within 100 feet of that barge?

A. Somewheres in that neighborhood.

Q. And she was swinging under a starboard helm when she struck you?

A. Yes, sir.

Re-direct examination by Mr. Goulder (153):

Q. Have you any idea how far this tow was, the last of the tow, below the New York when the New York struck you?

A. I have, she was pretty well astern of the New York.

Q. Pretty well astern of the New York at that time?

A. Yes, sir, she was more than what the model shows.

Q. Put it down as it looked to you?

A. I should say she was anyway two boat lengths past the barge.

Q. That the New York was two boat lengths at least past the last barge when the New York struck you?

A. Yes, sir.

Q. And the barge well out in the stream from the place where the New York hit you?

Re-cross examination by Mr. Wisner:

Q. What boat do you refer to when you say two boat lengths?

A. The Conemaugh.

Q. The Conemaugh is 250 feet long, isn't she?

A. Yes, sir, somewheres about that.

Q. And you say the stern barge of the tow was at the time of the collision two of those boat lengths from the Conemaugh at the time of the collision, do you say that, or from the New York?

A. Below the New York.

Q. You have then stated four times she was 300 feet from the Conemaugh—

Mr. Goulder: No, he has not stated that. He has especially corrected you.

A. I said 300 feet down the river, but this time when we put our wheel starboard that she was 300 feet down the river, but still she was out in the river; I do not mean to say she was 300 feet from the Conemaugh.

Q. Whom do you mean by she?

A. This stern barge.

Q. What distance do you mean to testify when you say she was 300 feet below you?

A. This barge was 300 feet below us when we put our wheel starboard.

Q. Where was the New York then?

A. She was somewhere near abreast of that barge.

Q. Abreast of that barge and 300 feet below you?

A. Yes, sir.

Q. And within 100 feet of her?

A. Yes, sir.

Q. You put your helm hard-a-starboard, then swung a point or a point and a half at the very most, the New York came up with her helm hard-a-starboard, swinging to port and struck you?

A. I don't know as it was hard-a-starboard, but she was swinging very fast when she came where I could see her.

Q. She was swinging as though her helm was hard-a-starboard?

A. Yes, sir, when she got close enough to me to see her.

May, (156):

Q. At the time of the alarm whistle, as it appeared to you, was he nearer the Canadian shore, the tail of the tow, or the vessel you were on?

A. I think the Conemaugh was a little bit nearer the Canadian shore.

Q. In your best judgment and estimate, how far below you in the stream was the tail of the tow at that time, or about that time?

A. Well, it might have been two or four lengths of the Conemaugh.

Q. Between the tail of that tow and the Canadian shore what space was there?

A. I guess pretty near four lengths of the Conemaugh, that is what I mean.

Q. Did you at that time see the New York and notice her so you can tell us anything about where she was at the time of the alarm signal?

A. Yes, sir, she was some place between the last barges.

Q. Somewhere along in there?

A. Yes, sir.

Lawson, cross-examined, (163):

Q. And it arises in your own mind that the distance between the last barge of the tow and the Conemaugh at the time of that collision was two or three lengths of the Conemaugh?

A. Yes, sir, I should judge it was that.

Crowe, (175):

Q. Now, take it at the time of the alarm whistle. Are you able to state, and if so, you may state, as it appeared to you, which was closer to the Canadian shore, your vessel, or the tail end of the tow?

A. I think the Conemaugh was.

Q. And in your best judgment, how far down the river below you was that tail of the tow, that last barge?

A. I should think between three and four lengths of the Conemaugh.

Q. And what do you say as to the distance she appeared to be out from the Canadian shore at that time?

A. I don't know. I don't think it was half way in the middle in the river. She was over a quarter of the way out from the Canadian shore.

Q. At that time of blowing the alarm whistle, state if you can, where the New York was, or where she seemed to be?

A. Well, she was somewheres around the last barge of the tow.

Cross-examination, (176):

Q. Had the Conemaugh passed by the barge at that time?

A. How do you mean?

Q. Passed the stern of her?

A. Yes, sir, I think she did.

Q. That was at the time the alarm whistles were blown?

A. Yes, sir.

Q. Had the whole of the Conemaugh got passed the stern barge at that time?

A. I didn't notice.

Q. Which way did you look to see the stern barge?

A. Well, I looked a little towards—right about abreast of me, I think, maybe a little back.

Q. A little forward, didn't you?

A. Maybe a little astern.

Q. And at that time the New York had not passed the stern barge?

A. I could not say whether she was past her. She was somewheres close around her anyway.

Verrault, on Smith's coal dock, (191):

I heard two blasts two or three times and several short whistles. I saw the New York coming up over a mile below when the Conemaugh first blew to her. I heard no engine signal. New York was coming pretty lively, between eight and ten miles per hour. Usual course for down boats past dock to go on Canadian shore. Bound up boats most of them go on American shore. Saw Conemaugh's colored and white lights; they were brightly burning. Collision about three lengths of Conemaugh above end of tow.

Johnson, (192):

On coal dock with Oscar Lawson at time of collision. Conemaugh blew check whistle and headed for Canadian shore. She blew three signals of two blasts to the New York, after that I heard a few short whistles. No answers from New York. Saw New York's red and bright lights. *I watched her, but lost track of her light as she turned towards*

the Canadian shore. New York near second or third barge when I lost red light. Nothing there to hide it. I saw red light again just before collision. New York coming pretty fast. I heard no engine signal on New York. Collision was about five lengths of Conemaugh above last barge in tow.

The following witnesses from the coal dock say the New York's red light disappeared just before she got up to the Amaranth.

Lawson, (160),

says it disappeared and then he saw it again just before the collision.

Mrs Linderman, (165).

Johnson, (192).

H. P. Linderman, (169).

A Just as she commenced to turn where she came up the river and got pretty near the barge, she commenced to swing over to the Canadian shore and I lost her red light.

Q. At the time you lost that red light, was she below the tow a little or a little above it, or right up to it?

A. She was about two lengths below the tow.

Q. What caused you to lose that red light, if you know?

A. When she commenced to turn.

Q. Was there anything there, if she didn't turn, if you saw, to prevent you from seeing the red light?

A. There wasn't anything.

Q. Did you see the red light again at any time?

A. Yes, sir, just before the collision.

Q. How fast was the New York going, in your judgment?

A. About nine miles an hour.

Q. How long have you been on that dock?

A. Two summers.

Q. Have you noticed the usual course of boats bound up and down the river at that point?

A. I have.

Q. Which side of mid-channel is usually used by steamers going down?

A. Going down most generally they take the Canadian side; most always.

We submit that the foregoing testimony clearly demonstrates the justice of charging the New York with the three faults heretofore stated, and further, on this testimony:

4. We charge fault in the New York in that if for any reason it was necessary for her to make a change of course to clear the tow, she did not resume her course as soon as the obstruction was cleared, but continued on the new course across the channel and into the Conemaugh.

5. In that she did not even maintain this last course across the channel, but that just immediately preceding the collision she swung slightly under a starboard helm so as to strike the Conemaugh on her bow.

On this last charge of fault, some of the witnesses testify emphatically (and are not contradicted), that just as the New York was striking the Conemaugh, she swung some to port; others, including Captain Miller, testify that they thought that they noticed this later movement on the part of the New York, but will not be positive.

We concede that Captain Miller would not swear positively that at the time of shutting out the green light, when he blew the alarm, that the New York made any greater change in her course, that is, *turned at any broader angle*, than the position in which she had put herself, with respect to the tow, made necessary.

We concede, further, that he would not be positive that the New York was under a starboard helm when she struck the Conemaugh, but this we apprehend to be immaterial,

and we do not see how it may be material to the court whether the New York ran straight for the tail barges of the tow until *she had to turn off broadly from them, or whether she turned at a greater or less angle than the position in which she put herself required, since it is conclusively shown and we challenge counsel to find any contradiction whatever in the record of the fact, that she did make the turn there.* Further, we cannot see how it is material to the court to find whether, after making this turn and deviating from her course, she went in a straight line to where the collision occurred, on the Canadian channel bank, or whether she made another turn after that, when colliding under a starboard helm, as, in the latter event, it could only add one more charge to her faulty navigation, for which, under any event, she must be condemned. *Beyond contradiction she is shown to have deviated, whether in a straight line or otherwise, five or six hundred feet to the eastward of any deviation made necessary by the presence of the tow.*

With the case of the John L. Hasbrouck, 93 U. S., 405-410 as a precedent, the District Court held that:

"It was her duty to starboard and resume her course as soon as possible, having regard to the exigencies of the situation." And further says, "There was ample room for her to have obeyed these requirements, which would have taken her under the stern of the Conemaugh. The master of the Conemaugh had a right to expect this plain duty would have been performed, for his vessel had then crossed the proper path of the New York. A fitter case for the exercise of disciplinary power committed to the inspectors of steam vessels than that afforded by the navigation of the New York can scarcely be imagined. Revocation of the license of her master or an extended period of suspension, would have a salutary

effect in promoting the safety of life and property on the lakes. The case of the New York is without the shadow of a defense." 53 Fed. p. 556.

With the vessels in the position they were at the time this third signal was blown, and in the light of after events which have proven that the New York went to the Canadian channel bank, we concede that the Conemaugh would have cleared the New York if she had early ported and swung down on the port hand of the New York and next to the tow. But to argue that he should have done so is unfair criticism, because the conceded proper course of the New York was next to the tow, and not where she actually went. *The law gave the Conemaugh the right, and imposed on her the duty, to expect the New York to go, not where she actually went, but precisely where counsel argues that the Conemaugh should have gone.* In other words, it is argued that the master of the Conemaugh should have known that the New York would take a course directly opposite to what the law says she should take. It charges him with the duty of knowing that the New York, privileged to deviate only so far as was necessary to clear the tow, would continue her deviation beyond that point. If he had ported and taken the course which the law gave to the New York, and if the latter had performed her legal duty and made no greater deviation than was necessary to avoid the tow, there must have been a collision, for which the Conemaugh would have been responsible. We contend that the criticism is unjust, and that it was not the legal duty of the Conemaugh to port and go into the rightful course of the New York, but that the courses of both were then irretrievably fixed

and determined by law, and the Conemaugh had no right to turn into, down or upon the course which belonged to the New York, and which was next to the tow. On the other hand, her sole duty was to avoid and keep out of the course which belonged to the New York, and the collision occurring where it did, shows that she fulfilled her duty in that regard. The whole argument of port hand being proper for the Conemaugh is based upon facts disclosed by the collision, from which it is learned that the New York did leave an opening on her port hand, after passing the tow, through wrongfully leaving her course, and is just such criticism as is condemned in the *Nevada*, 106 U. S. 154.

We contend that under the established principle of law that the crew of a vessel know best what was actually done on board their own vessel, the respondent has withheld the best proof of the facts as it claims them, and is certainly entitled to have no doubtful fact resolved in its favor.

If the New York had been in charge of a competent and attentive master, there was nothing more dangerous in the situation than is attendant upon the ordinary and daily navigation of the channels connecting our Great Lakes up to the time that the New York changed her course close to the tail end of the tow, and then there was danger, conditioned only, upon her unnecessarily, negligently and unlawfully maintaining this changed course.

As Captain Miller conceded in his examination, a change may have been necessary, and the initial change may or may not have been more than was then required. The New York would be expected to maintain that change only

as necessity required, but the captain of the Conemaugh took the precaution of blowing an alarm and starboarding to give the New York more room. At this time, there is nothing but clear water between the Conemaugh and New York, and yet the answer concedes that the Conemaugh was not seen until she blew this alarm.

From the above testimony it is clear that then the New York recognized the situation as one for the use of the starboard helm, and starboarded, but too late. (See answer which bears out above testimony as to this last movement (10).

Speaking of the time the Conemaugh blew the alarm, the answer says: "*A collision was then inevitable, and there was neither time nor room enough to stop the engine of the New York, and the only way left open to avoid a collision was to continue under headway and swing clear under a hard-a-starboard helm. This was done.*"

While the answer thus confirms our claim that the New York was swinging to port at collision, it goes further and, while disputing the libelants' claim as to distance between the vessels at this time, affirms the propriety of the Conemaugh's keeping on over toward the Canadian shore, instead of reversing, as it asserts that the New York's only hope of avoiding collision was in her starboarding, and thus turning *toward* the course *away* from which the Conemaugh was going.

With the tow so far from the Canadian bank and the collision so close to that bank, and the added fact that the New York did not see the Conemaugh until the collision was inevitable, there would seem to be sufficient data to

account for this collision. With the tow close on the port hand of the proper course of the New York, and with a channel several hundred feet in width on the starboard hand of this proper and intended course of the New York, and with the collision occurring near the Canadian shore and a long distance on the New York's starboard hand from the tow, it seems that the same conclusion should be reached in this case as was reached in that of *The Transfer* No. 4, 44 Fed. Rep. 304, which is almost parallel.

The reasons for condemnation in the case of the John King, cited below by respondent, are stated as follows :

"She had concluded previously to pass across the bow of the ferry boat, but had received no consent from the ferry boat to such a course, and there was still time to abandon that purpose and go astern. *The latter course was plainly safe, the former doubtful* ; and, quite irrespective of any rule of the supervising inspectors, *common prudence* required her to adopt the *safe course* and pass astern."

In that case, therefore, there was doubt of the ability to cross the bows (the contrary appearing in this case), and there was no obstruction to prevent the boat passing under a port helm, and further than that, the boats were there in such a situation that the red light of one was opposed to the green light of the other. We are of opinion, however, that while the John King case is not parallel with the one at bar, it nevertheless exonerates the *Conemaugh* *for not having stopped and reversed*, in the following words, to-wit :

"But there was still an interval, during which the ferry boat had a right to expect that the propeller would make a proper maneuver to avoid her; and, as she could not know that the propeller would not alter her course to starboard, it would have been as peril-

ous for the ferry boat to stop and back as to proceed. We think that she properly delayed stopping and backing until it became obvious that the propeller was not going to clear her, and, in the short intervening distance, this was not obvious until the propeller gave the alarm signals, and then the ferry boat did all that she could. *The case is one for the application of the rule that a vessel which is primarily in fault for a collision cannot shift its consequence in part upon the other vessel, without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster.*" 48 Fed. 474.

We submit that the facts and law condemn the New York as solely at fault for the collision.

Respectfully,

HARVEY D. GOULDER, and

JOHN C. SHAW,

Proctors for the Conemaugh.